

**Brunswick Electric Membership Corporation and  
Local Union #495, International Brotherhood  
of Electrical Workers, AFL-CIO, CLC. Cases  
11-CA-13446, 11-CA-13771, and 11-CA-13829**

August 27, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On February 27, 1992, Administrative Law Judge Robert G. Romano issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brunswick Electric Membership Corporation, Shallotte, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent contends that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the contentions are without merit.

<sup>2</sup>In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee George Douglas Smith on May 10, 1990, we do not rely on the fact that a criminal assault charge was filed against Robert W. Leavitt, the Respondent's staff assistant and negotiating committee member. Therefore, we find it unnecessary to pass on the relevancy of R. Exh. 10, the verdict reached in the related criminal proceeding involving Leavitt.

The Respondent excepts to the judge's conclusion that during a meeting with employee Richard Norris on July 6, 1989, Ervin Etheridge, a line foreman, unlawfully created the impression of surveillance of employees' union activities. We find it unnecessary to pass on the judge's finding of the 8(a)(1) allegation as to Etheridge because it is cumulative and would not affect the remedy.

*Donald R. Gattalaro, Esq. and Michael W. Jeanette, Esq., for the General Counsel.*

*W. Britton Smith Jr., Esq. and Thomas E. Schroeder, Esq. (Smith and Ruff), of Charlotte, North Carolina, for the Respondent.*

**DECISION**

**STATEMENT OF THE CASE**

ROBERT G. ROMANO, Administrative Law Judge. These consolidated cases were tried in Wilmington, North Carolina, on June 12, 13, and 15, 1990.<sup>1</sup> Local Union #495, International Brotherhood of Electrical Workers, AFL-CIO, CLC (Union or Local 495) filed the charge in Case 11-CA-13446 against Brunswick Electric Membership Corporation (Respondent Employer or BEMC) on August 3, 1989; and a complaint issued therein on September 15, 1989. Local 495 filed an original charge in Case 11-CA-13634 against Brunswick on December 12, 1989 (amended January 30). Consolidated complaint in the above cases issued on January 31. Local 495 filed a charge in Case 11-CA-13771 against BEMC on March 15; and, a second consolidated complaint in the above cases issued on April 30. Local 495 filed an original charge in Case 11-CA-13829 on April 30 (amended May 15). Third consolidated complaint (the complaint herein) issued in all the above cases on May 29. The complaint alleges violations of Section 8(a)(1), (3), and (5) of the Act. By answer filed June 12, Respondent Employer has denied the commission of any unfair labor practices alleged in the complaint.

At the opening of hearing the parties (essentially) adjusted all 8(a)(3) and (1) allegations raised in Case 11-CA-13634 that were made subject of complaint allegation, except one (complaint par. 8 (f)), which all parties agree is supported by charge filed in Case 11-CA-13446, and thus remained for litigation. Otherwise, General Counsel's motion to sever Case 11-CA-13634 and to withdraw its related complaint allegations on the basis of a settlement agreement, was granted.

The complaint as thereafter constituted, and as further amended at hearing more specifically alleges that the Respondent Employer has variously violated Section 8(a)(1) of the Act, by conduct of several of its supervisors, on certain days in June and July 1989; in the first and second week of September 1989; and on February 15 and 21: by certain alleged interrogations of employees; and/or, by alleged threats of loss of benefits, jobs, and other unspecified reprisals, if the employees selected the Union as their bargaining representative; and/or in encouraging employees to identify other employees who supported the Union; in creating an impression among its employees that Respondent Employer was engaging in surveillance of its employees' union, or other protected concerted activities; in harrasing an employee because of his union activities; and, finally, by expressing to an employee the futility of selecting the Union as a collective-bargaining representative.

The complaint additionally alleges as violative of Section 8(a)(1) and (3) that Respondent Employer: (a) on March 27 denied the request of an employee to be represented at an interview that the employee reasonably anticipated would be a disciplinary interview, thereupon conducted a disciplinary interview, and issued a written warning; and (b) that on March 5 Respondent discriminatorily suspended another employee, and later on May 10 has discharged the same employee, for discriminatory reason.

<sup>1</sup> All dates are in 1990 unless otherwise stated.

Finally, it is alleged that in violation of Section 8(a)(1) and (5) of the Act Respondent has refused to bargain with the Union in that Respondent Employer, on or about March 1, unilaterally, without any notice or bargaining with the Union, has removed the duties of the drafting and mapping coordinator, and, of the load management coordinator from the certified unit.

#### Procedural Matters

On October 9, Respondent Employer filed a motion to reopen hearing (dated October 5) for the limited purpose of receipt into evidence of certain attached documents (uncontested) previously unavailable at time of hearing, namely:

(a) a verdict rendered by the District Court of Brunswick County, North Carolina, with (apparent) entry date of September 10, on an assault charge brought by George Smith, Jr. (on May 9) against Robert W. Leavitt, finding Leavitt not guilty (Verdict); and,

(b) an appeals decision of the Employment Security Commission of North Carolina, with (mailing) date of September 17, on George Douglas Smith's claim for unemployment benefits (on which Smith was initially determined not disqualified for benefits), finding Smith was discharged for misconduct connected with his work, and disqualified for benefits (Benefits Appeals Decision).

An order to show cause issued on October 12, returnable on or before November 2. Counsel for General Counsel filed an opposition to Respondent's motion to reopen hearing, received October 15; and, Respondent timely filed a brief in support of Respondent's motion on October 31.

Thereafter (other) counsel for General Counsel filed a motion to reopen and consolidate cases, dated November 6 and received November 9. Therein, while counsel for General Counsel continued to oppose receipt of the above two documents, counsel for General Counsel also moved to reopen the hearing and to consolidate a (new) complaint in Case 11-CA-13972, which had issued on October 31. The complaint therein (essentially) alleged that since on or about July 3, Respondent Employer had refused to engage in contract negotiations if the Union allowed George Douglas Smith (who is a subject of 8(a)(3) and (1) allegations in the previously heard consolidated cases) to attend negotiation sessions, allegedly in violation of Section 8(a)(5) and (1) of the Act.

On November 26 an all party conference call was preliminarily held on the General Counsel's motion during which all parties were afforded opportunity to state their positions on any further case consolidation, and did, including in that regard most notably Charging Party Union providing an initial notice that the alleged 8(a)(3) Smith, who was in the National Guard; had been activated; and was to be sent to Saudi Arabia soon (to participate in Desert Storm); and thus, as a practical matter, would not be available for either a trial, or negotiations. Consequently, the Charging Party Union subsequently requested the charge in Case 11-CA-13972 be withdrawn, which was approved by the Regional Director, with counsel for General Counsel meritoriously withdrawing the motion as rendered moot.

The procedural issues then remaining open go to the issue of receipt of the documents. Counsel for General Counsel has not contested authenticity in opposition, but rather has contended that the verdict is not relevant to the issues in the instant matter, and thus should be excluded under Rule 401 of the Federal Rules of Evidence; and, under related holding of *U.S. v. Kerley*, 643 F.2d 299, 301 (5th Cir. 1981), that any arguable probative value is substantially outweighed (essentially here) by a danger of unfair prejudice, and a confusion of the issues, under Rule 403.

While acknowledging the basic holding of *U.S. v. Kerley*, supra, Respondent nonetheless urges the reasoning of the Court therein is inapposite to instant NLRB proceeding where counsel for the General Counsel had used evidence of Smith's filing such charge to support the Union's contention Leavitt assaulted Smith.

Counsel for General Counsel in turn similarly concedes Respondent's basic urging that the Board has heretofore held that a decision of a state agency on a matter related to those in issue before the Board is relevant and admissible into evidence, "for whatever probative value it may have." *Supreme Dying Corp.*, 147 NLRB 1094, 1095 fn. 1 (1964), enf'd. 390 F.2d 493 (1st Cir. 1965). Nonetheless counsel for General Counsel has urged nonreceipt of a benefits appeals decision in the instant case matters, because of a contended prejudicial effect of that document that greatly outweighs any probative value it may have. The argument is made on the basis: (a) claimant Smith was not in attendance at the state hearing; and, (b) certain of respondent's witnesses that appeared there, did not appear here, and thus their testimony was not before the administrative law judge, and General Counsel did not have an opportunity to cross-examine them.

While the Board has held that a finding of guilty on an assault charge may be probative of who assaulted another, cf. *East Texas Motor Freight*, 262 NLRB 868, 872 (1982), nonetheless, the Respondent Employer's motion to reopen record for the purpose of the receipt of a verdict of not guilty in a related criminal proceeding is denied, essentially for the reasons stated above by counsel for the General Counsel in his opposition stated thereto, and, particularly because of the apparent applicability of Rule 401 and 403. E.g., confusions may arise if evidence that may fail to persuade on required criminal burden of proof, may yet persuade on a civil matter by weight of evidence. The verdict, identified as Respondent's Exhibit 10, is thus rejected, and it is placed in the rejected exhibit file.

In contrast, as it appears clear under Board decisional precedent that the State's benefits appeals decision is admissible, and that the General Counsel's urging to the contrary in this case, appears to more so to an evaluation of the extent of the probative value to be extended to the document, e.g., in the light of other credible evidence of record, counsel for the General Counsel's opposition to receipt of that document is overruled, cf. *Supreme Dying Corp.*, supra; and see *D. H. Martin Petroleum Co.*, 280 NLRB 547 fn. 1 (1986). Accordingly, the hearing is opened for that limited purpose; and the aforesaid benefits appeals decision is received as Respondent's Exhibit 11. Certain other procedural matters are more conveniently to be addressed later.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs

filed by the General Counsel and the Respondent Employer on or about August 9, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

BEMC, a North Carolina corporation, has various facilities in North Carolina, including one at Shallotte, North Carolina, where it is engaged in the distribution of electrical power and energy. The complaint alleges and Respondent admits that BEMC annually receives at its Shallotte, North Carolina facility, goods and raw materials valued in excess of \$50,000 directly from points located outside the State of North Carolina; and, that BEMC annually has derived gross revenues in excess of \$250,000 from BEMC's above business operations. I find BEMC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

##### 1. Employer's business

BEMC is a rural electric cooperative, which purchases electricity at wholesale from its power supplier, North Carolina Membership Cooperation (NCMC), which has, in turn, bought the power from some other investor-owned utility, e.g., Carolina Power and Light (CP&L) or Duke Power Company (Duke), etc. BEMC distributes the power at retail to its own member consumers (only).

BEMC is a cooperative with 4000 miles of transmission and distribution lines, serving roughly 47,000 members. BEMC serves all of Brunswick County, as well as certain surrounding coastal areas, and adjacent Columbus County. In addition to maintaining its principal offices and headquarters at Shallotte, North Carolina, BEMC has an operations facility there. BEMC has four operating districts in all. In addition to Shallotte, BEMC operates a small district office in Bolivia; and, operates separate district offices in Southport (Oak Island), and in Whiteville, North Carolina. Each location has its own manager, and each is run (essentially) autonomously.

##### a. Management

BEMC employs David James Batten as executive vice president and general manager. Batten is BEMC's chief operating officer. Batten reports directly to a 12-member board of directors, who are elected by the membership for 3-year, staggered terms. BEMC's annual meeting is normally held in October, but occasionally in November.

Complaint alleges and/or Respondent admits in answer and/or at hearing, and I find the following named individuals possess authority to hire and fire, or effectively recommend such action, and that they are supervisors as defined in Section 2(11) of the Act, and agents of Employer within the meaning of Section 2(13) of the Act: Executive Vice President and General Manager *David J. Batten*; Whiteville District Manager *Ronald Hayes*; Oak Island District Manager *Don Hughes*; and the respective supervisors of construction there, *Monte Herring* and *Martin Register*.

In its Shallotte district, BEMC also employs Bobby Gore as operations' manager, and, under Gore, *Donald Stanley*. *Bobby Davis* is district manager of Bolivia, a small district without any construction crews, but with *Charlie Reynolds* serving as the main operations person there.

BEMC has employed *Robert Walker "Chip" Leavitt Jr.* as a staff assistant since September 1981. Leavitt relates he has earned a BS-BA degree from East Carolina University, with a double major in economics and accounting; has a background in computer programming; had almost completed an REA management certificate; and, expected to obtain his MBA at the University of Wilmington the following year.

Leavitt presently works in finance as a controller; works in audits; does long-range electrical planning, rate studies; and, he coordinates with the different district offices. As amended at hearing, the complaint alleges, Employer admits, and I find Staff Assistant *Robert W. "Chip" Leavitt* is a supervisor and an agent of BEMC within the meaning of the Act.

##### b. The main foremen issues

The parties have joined issue whether Employer's right-of-way foreman *Floyd Cartrette*, and (3) certain line foremen namely: *John Reno Coleman*, *Ervin Etheridge*, and also *Bobby Johnson* (in regard to the nonsevered allegation), are statutory supervisors and/or agents within the meaning of the Act. (*Charlie Batts* is also a line foreman at Oakville, and he has participated in certain negotiations for Employer, though he is not alleged in the complaint to have engaged in any unfair labor practice.)

On the weight of credited evidence below, and the record as a whole, I conclude and find that the Right-of-Way Foreman *Cartrette*, and Line Foremen *Coleman*, *Etheridge*, and *Johnson* (and *Batts*), each respectively, is a supervisor within the meaning of Section 2(11), and an agent of Respondent Employer within the meaning of Section 2(13) of the Act.

##### 2. The appropriate unit; and union certification

BEMC employs various linemen who construct and work on lines; servicemen who go out and install meters, and do other normal service-type work; and meter readers, who read meters to account for consumed power. The complaint more specifically alleges, and the Employer admits the following trade and craft unit excluding meter readers and office clerical employees is an appropriate unit for collective-bargaining purposes, namely:

All trade and craft employees including Right of Way Operators, Groundmen, Apprentice Linemen, First Class Linemen, Second Class Linemen, Heavy Equipment Operator, Electronic Technicians, Warehousemen, Assistant Warehousemen, Servicemen, Lighting Technicians, Building and Ground Technicians, Load Management Coordinator, Coordinator of Services, Drafting and Mapping Coordinator, Staking Engineer, Junior Staking Engineers/Service Representatives, and Dispatcher at the Respondent's Shallotte, Whiteville, Bolivia and Oak Island, North Carolina facilities and the Whiteville Warehouse Coordinator; excluding Meter Readers, office clerical employees, guards and supervisors as defined in the Act.

The complaint further alleges, Respondent Employer admits, and I find, that at all times since September 19, 1989, and continuing to date, the Union has been the collective-bargaining representative of employees in the above-described unit appropriate for bargaining; that on September 27, 1989, the Union was certified as exclusive collective-bargaining representative for employees in the above unit; and, that by virtue of Section 9(a) of the Act, the Union has been, and is now, the exclusive representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of the above-unit employees.

### B. The Preelection Evidence

#### 1. Initial employment of "Doug" Smith

BEMC hired George Douglas "Doug" Smith on February 15, 1988, as a heavy equipment groundman on its right-of-way crew. Smith worked under supervision of James Floyd Cartrette. BEMC has employed Cartrette for close to 30 years.

In material times Cartrette was right-of-way line foreman, in charge of certain heavy equipment, a clipper, and a Kershaw bush hog. The clipper cuts flat right-of-way. The Kershaw trims under the powerlines. Cartrette has supervised a two-man crew that in material times included Smith and Wendy Mark Stevens. BEMC has employed Stevens as a heavy equipment operator for about 4 years. Cartrette generally ran the clipper, which makes better time; and Stevens generally ran the Kershaw. As assigned heavy equipment groundman, Smith's job was to cut around the poles, mark guys and telephone pedestals, whatever was in the right-of-way, and drive ahead in the right-of-way. Though the Company tries to keep the heavy equipment operating as close together as possible, it's impossible to keep them right together. The distance between the heavy equipment when operating can be as much as 3 or 4 miles, though usually they are within a mile or so of each other. Thus, if everything is going smoothly, Cartrette is going to be able to observe Smith and Stevens very little, generally, first thing in the morning and last thing in the afternoon. Their clearing work was of course, visible daily.

On August 31, 1988, Smith was appraised by Supervisor Cartrette (and by Whiteville District Manager Hayes) as making satisfactory progress in a 180-day new employee progress report (G.C. Exh. 5). Named as supervisor therein (I find) Cartrette therein effectively recommended that Smith become a regular employee. Cartrette also later evaluated Smith favorably on February 19, 1989, as a result of which Smith received a 26-cent raise, below.

General Counsel's Exhibit 6 is an employee self-appraisal performance record for the period February 15, 1988, to February 15, 1989. Smith therein essentially self-rated himself as performing overall satisfactorily. (In 14 categories rated, Smith self-appraised himself as being satisfactory in 6, as above average in 3, and as exceptional in 5.) The employee self-appraisal form is signed by Foreman Cartrette (as received) on February 23, 1989. More significantly, General Counsel's Exhibit 7 is a related performance appraisal record for Smith that was made out by Cartrette, and then signed by Cartrette, Hayes, and Batten, successively. At that time Cartrette awarded Smith no rating below satisfactory. Al-

though Cartrette reduced two of Smith's three (self-appraised) above-average ratings to satisfactory, and three of his exceptional ratings to above-average, notably, Cartrette agreed on three Smith self-appraised exceptional ratings and on one of Smith's above-average rating.

Thus, e.g., on 10, in rating Smith exceptional in his concern and respect for others, Foreman Cartrette at this time noted that Smith always takes other people(s') feelings into consideration, and is very effective in dealing with others. On 14, Cartrette also rated Smith exceptional in having a good relationship with all employees, and in dealing very effectively with members on problems that arise.

Indeed, Cartrette had at this time stated explicitly, "I feel he leaves members with (a) good image of the cooperative and its employees." In agreeing with one above-average (self) appraisal in regard to communicating work ideas and work results to others, Foreman Cartrette then also significantly observed Smith had, "no problem expressing ideas and thoughts to others." Cartrette, Hayes, and Batten signed the appraisal; and Smith signed on February 22, 1989. On February 23, 1989, Smith received a 26-cent raise from \$5.25 to \$5.51.

*Floyd Cartrette, John "Reno" Coleman, Ervin Etheridge, Established as Statutory Supervisors and Agents*

It is clear and I find that at least through late February 1989, all of Employer's management in line had evaluated Smith as a *wholly* satisfactory employee. Moreover, on the basis of Cartrette's reviews and recommendations, as well as other fully supportive evidence of record, I presently also conclude and find that James F. (Floyd) Cartrette is a supervisor as defined in Section 2(11) of the Act, and a 2(13) agent of Respondent Employer acting on its behalf.

John "Reno" Coleman conducts lineman operations for BEMC at Whiteville. Coleman similarly evaluates his crew's performance; and suggests (sic, in context and on this record, effectively recommends) hiring and firing. BEMC has employed Coleman in the Whiteville office as a line foreman for between 11 and 12 years. Additionally, in material times Coleman participated as a member of Employer's negotiating committee.

Line Foreman Ervin Etheridge (and Construction Supervisor Herring) has (have) similarly evaluated employee Richard Norris on July 13, 1989. I thus further conclude and find on the basis of the above evidence, and the record as a whole, that Whiteville Line Foreman *John Reno Coleman* and Line Foreman *Ervin Etheridge* are also supervisors as defined in Section 2(11) of the Act, and agents of Respondent Employer acting on its behalf.

Finally, BEMC employs Bobby Wadell Johnson as a line foreman. Johnson's evaluation and recommendations on employees does not appear as well evidenced as others, nor does the record establish as explicitly Johnson performs the same duties as other line foremen. However, Johnson (as well as Coleman and Batts) was (were) present as member(s) of Employer's negotiating committee in contract negotiations in material time (May 9). In that regard, Johnson has the same job classification of line foreman as do Coleman and Etheridge who are shown of record to be supervisors within the meaning of Section 2(11) of the Act, and as there is no evidence warranting conclusion that Johnson's foreman du-

ties are any different, I thus conclude and find it is more likely than not that Foreman Johnson is also a supervisor within the meaning of Section 2(11) of the Act. As the record reveals even more clearly that Johnson was Employer's agent for the certain purposes material herein, in agreement with General Counsel, and contrary to Employer, I conclude and find that Johnson, in any event, was an agent of Respondent Employer acting on its behalf for complaint purposes.

2. The start of the union activity; and Smith's prominent involvement

Russell W. Hatcher is employed as business manager of Local Union 495, IBEW. Hatcher had his initial contact with BEMC in May 1989; and, the Union started having meetings with employees in June. In that regard, Smith first became involved with the IBEW in late May 1989; and, Smith helped arranged the meetings of the employees with the Union. Smith also distributed union authorization cards to employees for signing; and, Smith encouraged employees to be a part of union activities.

Indeed, Smith was openly in support of the Union from the start. Smith informed his supervisor, Right-of-Way Foreman Cartrette, and Line Foreman "Reno" Coleman, a friend, that Smith was for the Union; and, Smith also told Construction Supervisor Monte Herring that Smith was all out 100 percent for the Union. Indeed, in late June 1989, Smith had occasion to go in to talk to District Manager Hayes about a purported report of an employee's complaint about his union activities, discussed below. It is clear that from the start of the union activity, Respondent was aware Smith was very active in the Union.

3. The events of June 26 and 27, 1989

a. *Coleman's discriminatory threat of unspecified reprisals*

The complaint alleges that on June 26, 1989, Line Foreman John Reno Coleman has threatened employees with unspecified reprisals for engaging in union activities.

Smith relates that on this day, a short while after 11 p.m., Line Foreman Reno Coleman had called Smith at Smith's residence. Smith's account is that Coleman first apologized for calling so late; and, Coleman said he had had a conversation with District Manager Hayes that day. Smith first related that Coleman then told Smith that *Hayes had told Coleman Smith had been harassing employees about the union activity they were conducting; and, that it was to stop immediately.* Smith later clarified, Coleman told Smith that Hayes had told Coleman to contact Smith, and tell Smith that an *employee had complained to Hayes that Smith had been harassing that person about joining the Union. Smith reaffirmed Coleman said the harassment had to stop immediately.*

The Employment Involvement Committee (EIC) is a local committee set up at some (undefined) previous point in time to resolve complaints between employees and management, and of which Coleman had only recently been elected a member. Thus, Hayes testified EIC is a committee that tried to work between management and employees, with any type of problems, whether it be a grievance or whether it be something of this type, where Hayes as district manager, just wanted to sit down and discuss a problem with an employee.

Coleman confirms that in June 1989 Coleman was elected to the EIC by his fellow outside people (line foremen, linemen, groundmen, apprentices, etc.) to represent them from the Whiteville office. Coleman also confirmed that it was as a member of EIC Coleman had the telephone conversation with Smith in June 1989.

BEMC has employed Hayes as its Whiteville district office manager for approximately 5 years. (Hayes had been previously located in Shallotte as manager of member services, systemwide.) Hayes relates that an employee had earlier informed Hayes that (still) another employee had told the reporting employee that Smith had been harassing him; and, the employee was getting tired of it. But in the same breath the employee had also said, "Doug's a good boy. I think a lot of him. I don't want to see him get in trouble. That's the reason I'm telling you this, I don't want to see Doug get in trouble, but maybe you can talk to him."

Hayes relates that he thought about it a while. Hayes asserts that he had just wanted to discuss something with Smith, but Hayes didn't want it to be interpreted by Smith as trying to reprimand him or cuff him down, so to speak. Hayes states there were *no* reprimands involved.

Hayes recalled Coleman was to be off that day, but Coleman had come into the office sometime during the day to transact some type of business. Hayes had not used Coleman, or even the EIC before on any other matters. Indeed, Hayes has revealed it was his first opportunity to use that (EIC). In any event, Hayes recounts that he told Coleman exactly what had been told to Hayes. However, Hayes did not use (state) any names because Hayes viewed that as privileged information. Hayes' version is he asked Coleman if Coleman would please contact Smith and let Smith know what had been said; and, ask Smith if everything was okay or did Smith want to discuss it in other words, just sort of leave it up to Smith.

On cross-examination, Hayes reaffirmed that on June 26, 1989, Hayes asked Coleman because of his position with the EIC, if Coleman would call Smith about harassment of employees. However, Hayes (seemingly) then inconsistently with Hayes' claim advanced on basis of Coleman's asserted EIC position, subsequently has asserted that as Coleman was not Smith's supervisor, Hayes could not tell Coleman to do it, but could only ask; only then to acknowledge Coleman works directly for Hayes. Hayes' testimony on the use of Coleman's EIC position was strained and unpersuasive. Coleman otherwise confirms that Coleman's day off was Monday; and, that he happened to be in the office that day, when Hayes saw him, and asked Coleman if he had time to come into Hayes' office and talk to Hayes for a minute. When Coleman went into Hayes' office, Hayes said, "I'd like for you to do something for me." Coleman replied that he would if he could. Coleman's initial recollection was somewhat ambiguous in recounting Hayes then said, "What it is, another employee has come to me and told me that Doug has been harassing him about the Union. I think a lot of Doug. I do not want to see him get in trouble and I wish you'd talk to him and tell him to sort of lay off a little bit." Coleman said, "I'd be glad to because me and Doug was friends. There would be no problem." (Smith has admitted Coleman is a friend of Smith; and that Coleman at the time was on the EIC. However, Smith has stated that Coleman did not ask that Smith ease up and not harass employees, or not get (be)

in violation of BEMC's harassment policy. In these respects, I credit Smith.

Moreover, in contrast with Hayes' account, and more congruous with Smith's recollection, on cross-examination Coleman then related Hayes had called Coleman into his office and asked Coleman, if he would call Smith and tell Smith an employee had come into his office and said that every time that he turned around, that Smith was harassing him about the Union; and, that *Hayes had said, that it would have to stop immediately, and, we cannot have that.* Coleman's testimony also clarified it was Hayes who said, "I care enough for Doug, that I don't want to see him get into any trouble."

Coleman related that his understanding at the time was there was a rule at BEMC about talking about the Union on company time; adding, if not mistaken, Hayes and them had talked to them about it. Coleman's understanding about calling Smith that night was thus (consistently) that he was helping Smith out. Coleman thought Smith might be disciplined for talking to employees on company time. If there was any way Coleman could help Smith, where Smith would not be disciplined, Coleman relates that he was willing to do that.

Coleman went home; and at first, it slipped his mind. When he remembered, Coleman confirms he called Smith that night, late, close to 11 o'clock. They talked a few minutes and then Coleman said, "Doug, I got something I need to tell you." Smith said, "Okay." Coleman asserts that he has always been able to talk to about anybody because, it seems like the boys trust me and I trust them, and Doug was very receptive; and, to Coleman, it appeared Smith was eager to hear what Coleman had to say. So, Coleman said, "Doug, Ronald asked me would I talk to you. He (Hayes) said that another employee had come to him and said that you were harassing him. Every time that they turned around, that you were there talking to them about the Union. Ronald said that he cares a lot for you, he don't want to see you get into trouble."

Coleman relates, his statement to Smith in the phone call, made Doug mad. Smith said, "They're just trying to keep me from talking to anybody." Coleman replied, "Doug, I don't really believe that he would have made it up and told me this, to get me involved in it, to tell you this just out of the wild blue yonder. Maybe an employee did come to him and talk to him about it." Coleman repeated that Smith was sort of hot about it; and, Smith said a few things about how they was just trying to keep him shut up about it. Coleman recounts that finally, Smith cooled down and they got to talking about it. Coleman felt good about it, because he got to talking to Smith and helped get Smith cooled down about the fact. Smith then said, "Reno, I'm not going to say anything else about it. I'm just going to let it lie like it is." Coleman said, "Doug, I don't want you to get upset at nobody at work or anything about it, nothing like that." Smith replied, "As far as I am concerned, that's it."

Coleman related, BEMC's policy is you are not suppose to be able to harass anybody about anything at work. Coleman reaffirmed Hayes had brought up the term harassment with him. Coleman is not familiar with the BEMC's policy E-36, entitled 'Work Rules,' but in regard to number 23 which speaks to, "unlawful harassment of a fellow employee," he is familiar with that. That is what he was talking about when he and Hayes were talking about harassment.

However, Coleman then related that in the harassment rule, his sense of unlawful is something that's not legal, like talking union on the job.

*b. Maintenance of an unlawful rule which forbids talking about the Union during worktime*

In brief the General Counsel has moved to amend the Complaint to add as a violation Respondent Employer's maintenance of an unlawful rule which forbids talking about Union, on the basis that the matter was one fully litigated at the hearing, with no objection from the Respondent. See *American Boilers Mfg. Assn.*, 366 F.2d 458 (9th Cir. 1964). On weight of evidence and precedent that is considered below, amendment is allowed for the reason stated; and, see and compare *Corry Contract*, 289 NLRB 396 fn. 3 (1988).

At first Coleman affirmed that nobody had ever told Coleman, nor had Coleman told his employees that you can't talk per se on the job. Coleman shortly added however, now, at one time Hayes told them that we could not discuss union activities on the job. At first, Coleman related he may have told employees that, but added, to the best of his recollection he didn't. In later examination however, Coleman revealed he had told employees that they weren't supposed to talk about the Union on the job. Coleman's assertions in this area simply vacillated.

Acknowledging an attempt was then being made at an impeachment of its own witness Coleman on the matter of Coleman's testimony indicating existence of a discriminatory rule against talking about the Union, on Employer's further examination, Coleman reaffirmed that he had told his crew members, and so-to-speak as a supervisor, if the boys were out there on the crew, they weren't supposed to be talking about the Union on the job. Coleman then defined on the job as being from say 8 o'clock til dinner and then from after dinner til 4:30 in the evening: Coleman appearing to then testify that Employer has no say about employees' own time. Moreover, Coleman has explicitly and only the more notably testified there were not any other subjects people couldn't talk about while on the clock, that he knew of.

Hayes affirmed generally there is no company rule about talking on the job. When then explicitly asked if there was a company rule against employees talking to employees about the Union on the job, though prefacing his answer with statement that Hayes was not that well up on National Labor Relations (Act) law, and with further assertion that with regard to company rules, we have done our best to abide by the National Labor Relations law as near as possible, Hayes then also testified that Hayes had told employees that we could not and would not discuss Union on the job because it interfered with the usual days work; adding, what they do at their breaktime and their lunchtime, any other time, that's their business. It is apparent from the above, that the testimony of Coleman, far from being impeached, has been in fact substantially corroborated by Hayes that while Employer had no rule prohibiting its employees from talking on the job, Employer had nonetheless discriminatorily imposed and maintained a restriction upon employees of not talking about the Union, whether related in terms of on the job or on work time. To extent Hayes may have on another occasion stated he cannot remember telling any employee not to talk about the Union on the job, that assertion is not persuasive in light of his other acknowledgements.

Smith relates that when he came in that (next) morning, thus June 27, 1989, they were scheduled for a safety meeting. Smith told Coleman that he would like for Coleman and himself to go in and talk with Hayes about the allegations of Smith harassing other employees. They met shortly thereafter.

Coleman confirms the next morning when Coleman arrived at work, Smith came up to Coleman and said, "Reno, I'm sorry but I've thought about this thing all night and I really want to talk to Ronald about it. I want some answers." Coleman replied, "I can understand how you feel. Let me go ask Ron." Coleman went over and asked Hayes, "Ron, have you got time to meet with Doug this morning. I talked to him last night just like you asked me to do and he's wanting to talk to you this morning." They were getting ready to go into a safety meeting. Hayes said, "Yes, I've got time to talk to Doug, but you have to talk to me now instead of waiting until after the safety meeting because I've got a meeting that I've got to go to." Coleman said, "I'll go tell Doug." Coleman did, and, Smith said, "Alright, I'll go meet with him." Coleman recounts that Coleman started to go into the room where the safety meeting was and Smith said, "No, hold on, Reno, you come and go with me." Coleman looked at Hayes, and Hayes said, "That's fine." They proceeded into Hayes office to have the meeting.

Hayes had confirming recollection that Coleman came to Hayes just prior to a scheduled safety meeting and said, "Doug wants to talk with you a few minutes." However, Hayes recollection was slightly different from Coleman in that he has Smith accommodated with an immediate meeting. Thus Hayes recalled he replied, "That's fine with me. Does he want to do it before the safety meeting or after?" Coleman said, "Well, he wants to talk to you right now." Hayes then agreed, as the safety meeting was going on fine without Hayes. So Hayes went to his office; and, Smith and Coleman came into his office.

Smith's version when there is he told Hayes, "Ronald, Reno called me last night and told me that I had been harassing employees and it had to stop. I'd like to know who I've harassed, because that has not been my intentions and I would gladly apologize." According to Smith, Hayes replied, "I didn't say that. I said that someone had come to me and said that they really liked you and they were afraid that you were going to get in trouble about talking Union on Company time." Smith again said, that if there were any problems that Smith would like to apologize, and get it straight with that person; and, that his intentions were not to harass anyone. (Smith, in garbled, if not disjointed fashion recalled during this conversation Hayes told Smith, Smith didn't know how management worked; and, management should always take (sic) of management.)

Hayes' account is Smith wanted to know who had told Hayes that information; and, who was filing a grievance against Smith. Hayes replied that there were no grievances being filed; that it was just a matter that Hayes felt should be brought to Smith's attention so there wouldn't be a grievance somewhere down the road. Hayes acknowledged Smith then asked Hayes who the employee was; and, Hayes wouldn't tell Smith. However, Hayes recounts that he made it plain to Smith that the employee had come to Hayes because another employee asked them (sic) to; that it was all because the employees liked Smith; and, that they didn't

want to see Smith get himself in trouble by harassing employees. Hayes said he had been asked by this employee, that the other employee had talked to, to just discuss it with Smith; and, that's what Hayes did, man to man, and that was all.

In regard to (purported) harassment, Hayes explained (seemingly) to Smith that it was (occurred) on the job and the employee was tired of hearing it and didn't want to hear it anymore, but yet he liked Smith; didn't want to see Smith get in any trouble; and (had asked) would Hayes please talk with Smith.

According to Hayes, there was really nothing to be done. This was just a general discussion between District Manager Hayes and employee Smith. However, Hayes acknowledged that Smith at the time became very upset. Not violently upset, just upset over the fact that Hayes would not give Smith any names. According to Hayes, after a few minutes of discussion, everything was fine.

Coleman confirmed Smith told Hayes that he wanted to know more about what Coleman had to tell him the night before; and that (at least this time), Hayes told Smith that an employee had come to him and said that *another* employee had told them that they (sic) were harassing; and, that every time they turned around, Smith was asking them about the Union. Smith asked, "Who is it that I am suppose to be harassing?" Hayes said, "I cannot tell you who it is. That is confidential matters." Coleman confirms that sort of made Doug mad.

Coleman's testimony also revealed that Smith was concerned about his ability to engage in union activity, in Coleman recalling that *the only time the Union was discussed was when Smith told Hayes that he felt like they were trying to keep him quiet about talking about the Union*. Indeed, when Smith got mad about it (Hayes not telling Smith who had registered the complaint), Coleman recalled he said, "Well, Ronald, if you would tell Doug who it was then Doug would not have to come into contact with that person again so that he wouldn't be harassed." Hayes said, "I cannot do that." (I am convinced any management interest statement made by Hayes as unclearly indicated by Smith, was more probably made at this time.) Coleman recalls Smith then said, "Alright, since we have had this meeting man to man, we are going to leave it right here."

#### *c. Hayes' alleged discriminatory threat of a loss of jobs*

The Complaint alleges that on or about June 26, 1989, Whiteville District Manager Hayes threatened employees with a loss of jobs, if they selected the Union as their bargaining representative.

#### (1) Smith's account

According to Smith, Hayes also told Smith in the morning conversation of June 27, 1989, that *when the Union came in, Hayes was going to have to lay off the last three employees that were hired, because the Company was going to have to go by strict job classifications*. In that regard, Smith recounts Hayes had said that he had talked to General Manager Batten and convinced Batten to buy a tree truck; and, he had hired these last three employees to work on the tree truck, but he had told them in hiring that they were hired as groundmen for the line crew; and, *when the Union came in, that they*

would have to have strict job classifications; and that he would have to lay those three men off.

There is considerable ambiguity, if not confusion of record in regard to the background for witnesses' statements as made of two right-of-way crews, and related background of certain cross-training, both generally, and, specifically in regard to the alleged threat in the above June 27, 1989 conversation, and as bearing on a subsequent Smith requested transfer in late February, below.

(2) Hayes' and Coleman's accounts

(a) *Background of right-of-way crews; and, extent of cross-training with line crews*

Hayes recalled the discussion had then turned to another subject, namely, the subject of a (yard) right-of-way crew that they (BEMC) had put on roughly the first of the year (1989). Hayes explained BEMC now has two types of right-of-way crews working in Columbus County; (1) the heavy equipment (Kershaw and clipper) crew of Cartrette, of which Smith was a member; and, (2) a yard tree (bucket truck and chipper) crew, which normally goes in peoples' yards trimming trees, where heavy equipment cannot maneuver around.

Hayes testified credibly that when BEMC put the certain (new) yard tree right-of-way equipment in Columbus County, Hayes had also received an approval to hire three employees for Columbus County for right-of-way. However, Hayes relates he had convinced General Manager Batten at the time that it would be better if they would hire three (line crew) groundmen instead of right-of-way people and Hayes cross-trained them. Hayes thus felt it would be better for Whiteville if Hayes could have three employees that Hayes could train to do any scope of work in case of hurricanes, or in any type of major disaster; or so that when Hayes might not need a right-of-way crew, Hayes could use the men somewhere else, in any area.

Hayes testified relatedly that a right-of-way person is trained to cut right-of-way, while a groundman is trained (more broadly) to cut right-of-way, hand (sic) transformers, climb poles, etc. A groundman thus gets (trained in) the full scope of BEMC's outside operation as the groundman progresses through an apprentice lineman. Hayes asserts, in contrast, that a right-of-way crew cut right-of-way, period.

Coleman confirmed that they had one (yard) right-of-way crew at Whiteville at this time (which he distinguished from the regular heavy equipment right-of-way crew of Cartrette, Smith and Stevens). Coleman relates that this (yard) right-of-way crew did anything, whether it was yard right-of-way work or clearing new right-of-way for construction jobs. Thus, in addition to the yard trim of trees, Coleman relates that when the stacking engineer got a job and they had to build a line right down beside the road, or right through the edge of the woods or something, that (yard) crew also goes in there and cuts trees, trims up the overhang, or anything like that.

Coleman testimony also revealed the makeup of this yard crew has changed from time to time, due to cross-training. Coleman has explicitly confirmed the last three men who were hired were hired as groundmen for the line crews; and, (essentially) that when the tree trimming bucket truck and chipper was bought, they transferred three men over to that crew. However, Coleman recounts that they would work on

it a while, and then others had alternated coming on that crew. Coleman recounted generally that all their crews are like floaters, as they are suppose to be able to work anywhere on any crew, whether it is overhead or underground.

However, Coleman's testimony has also made clear that the cross-training that goes on is between the other (yard) right-of-way crew (of hired groundmen) and the underground and overhead line crews. Coleman confirmed people did not want to cross-train into the (yard) right-of-way crew. As far as Coleman knew, they have not had anybody to cross-train over into Smith's heavy equipment crew, to be discussed further below. Coleman testified flatly that people do not normally rotate on heavy equipment crew. (Though there is no rotation on the heavy equipment crew, BEMC has other people that if something happened and they needed them to go there, they could put them on there.)

The stated lack of cross-training on the heavy equipment crew is to be distinguished from temporary use of that crew elsewhere. E.g., if the heavy equipment is down on that crew, i.e., if they're waiting on a part of something to come in. Coleman recounts they'd (the heavy equipment crew) always come out there and help us (line crew) work, if they didn't take a day off.

In regard to cross-training, Hayes has testified generally that it had worried him that they could have problems, if he had a groundman that cannot learn these other jobs. Hayes then recounted that what worried him about that was that someone could get hurt; and, Hayes explained further, that when he says "hurt," he doesn't mean fired or laid off, he means killed, dead; as they regularly work with anywhere from 240 to 69,000 volts everyday; or, in a few instances work with 100 to 1000 (volt) lines.

According to Hayes, the problem at this time was a lot of the employees did not like to work on the (yard) right-of-way crew. The work of this right-of-way crew is hot, nasty, dirty work. Not that other work isn't, but right-of-way is just a class of work a lot of employees didn't want to do; and Hayes at this time was getting some flak from it. Indeed, Hayes recalled that *Smith had told Hayes that some of them had talked to Smith, and that they just didn't like the way Hayes was rotating the crews around for training purposes and, that some of them just weren't going to work on the right-of-way crew.* Hayes thus asserts that on this occasion Smith had actually objected to the very subject of cross-training.

Be that presently as it may, Coleman confirmed that it was said that none of the boys liked to work on the (yard) right-of-way crew. (Coleman recalled BEMC at the time would put them on the yard crew for 3 weeks to a month and then they came off.) Coleman also recalled specifically that *Smith had said that nobody liked this cross-training; and, that when they got on a crew, they wanted to stay on that crew all the time.*

Coleman also confirmed Hayes that they had then talked about the right-of-way crews (sic) switching men from one crew to another and cross-training; and, that *they talked about how important it was that each man at Whiteville district be able to do anything that came along, whether it was underground work or overhead work; and, that if a man on the (yard) right-of-way truck could do underground, overhead and work on the right-of-way crew, then you had a man that could go anywhere, and not have to worry about it.*



Hayes recounts that he then explained to Smith why they had to do that. Hayes acknowledged that in doing so, Hayes did say to Smith *that there was a good chance that they could lose the three employees if they did not cross-train them and work with them, as they had hired three groundmen, which are line crew employees, not right-of-way employees.*

Hayes has specifically denied that he told Smith that somebody, or, that the three employees would be laid off if the Union came in. Smith centrally asserts Hayes had talked about somebody having to be laid off. In contrast, Hayes explicitly denied that he said, and Hayes further asserts that he did not intend to infer (sic, in context imply) that the three (groundmen) employees would be fired, laid off, or anything. Hayes asserts that what he said was, that Whiteville could lose the three employees; but not that they'd be fired, laid off, or anything.

Smith did not recall Hayes explain the need to cross-train employees and have folks rotate onto the (yard) right-of-way crew, and vice versa. Indeed, at one point Smith did not recall any discussion about cross-training. Nor did he recall Hayes tell Smith the reason there had to be rotation was so everybody would have some understanding of the right-of-way work. Despite Smith's nonrecall of a discussion of cross-training, I credit the mutually consistent recollections of Hayes and Coleman that cross-training was discussed in the above manner.

Coleman had supportive, if initially somewhat disjointed recollection that Hayes said, that if it wasn't for the right-of-way crew, the positions of the last three men that they had hired (or possibly the three youngest) would be lost. However, on other occasions Coleman essentially corroborated Hayes that Hayes told Smith and Coleman, that the three youngest men that they had were hired for a right-of-way, and that if they did not run this right-of-way crew and use them, they could lose those three positions; and, that Hayes explained that by "lose" what Hayes could see happening was those groundmen, if lost from the (yard) right-of-way crew, then they probably would have to be transferred to some other district where they were needed as groundmen, not as right-of-way people.

Although Coleman didn't recall hearing anything said about strict job classifications, Hayes acknowledged that he may have made a statement, he hoped it didn't come to where they had strict classifications because of the type work they do. Everyone needed to be at least vaguely aware of what the next person was doing because you rely on (one) another so much. Hayes added that if it (seemingly, the subject of strict classifications) was stated, that's the way it was stated.

Though at least on one occasion testifying he didn't recall how the subject of layoff came up, and his testimony appearing on still other occasion confusing as to (changing) identity of three men on the yard right-of-way crew to be affected in the loss, Coleman has explicitly denied hearing Hayes say that if the Union came in, that they would be laid off; or anything like that. However, Coleman didn't recall Hayes say anything about three men working in a particular area after the Union came in, or where the jobs or people would go.

Smith confirmed the meeting ended on friendly terms. Notably compatible with a nonthreat of loss of jobs, Smith re-

lated that he felt harassed (only) because Hayes would not tell Smith who the employee(s) was (were) that had complained of being harassed, because Smith knew that he had not harassed anyone.

#### 4. Batten's alleged coercive letter

The complaint alleges that on July 11, 1989, General Manager Batten unlawfully encouraged employees to identify other employees who supported the Union.

In support of this allegation, the General Counsel relies on General Counsel's Exhibit 4, a letter dated July 11, 1989, written by General Manager Batten, and mailed out to all Brunswick employees. In its pertinent part, the letter states:

I do want you to know and understand another very important fact. Nobody here is going to be threatened or coerced either way—pro or con. If you are being subjected to Union pressure, please advise your supervisor or come in and let me know personally. We will get it stopped. Employees here who support the Union are not going to receive any special preference and compliments, rewards and discipline will continue to be exercised as they have in the past. Even though we will be involved in this Union organizing campaign, our member/consumers deserve the best we can give them, and nothing will get in the way of that objective.

Please let me know if you have any questions.

#### 5. Alleged Etheridge and Herring unlawful conduct

The complaint alleges that on or about July 6, 1989, *Line Foreman Ervin Etheridge* and *Construction Supervisor Monte Herring* created the impression among employees that Employer was engaging in surveillance of their union activities.

BEMC had employed Richard Norris as a first-class line-man for 6 years in July. Foreman Etheridge filled out Norris' evaluation; and, Etheridge attended Norris' work performance evaluation on July 6, 1989, along with Monte Herring, construction supervisor. Norris relates at this time his wife was pregnant; and, during the evaluation, Herring reminded Norris that he was getting ready to have a family; that Norris better think about it; that Norris was being watched; that they were watching every move he made; that he had been seen at meetings and (sic) union activity.

When asked for words (said), Norris said he had written them down in an affidavit, which was not introduced. (Almost a year later, on June 4, Norris gave an affidavit to an NLRB agent. Norris talked with the agent by phone. The affidavit came in the mail; and, Norris signed it before a notary, a friend of his mother-in-law. After eliciting the foregoing, Employer didn't pursue introduction of the affidavit. I conclude that Norris' account was not at substantive variance with his affidavit.)

On cross-examination, Norris (seemingly) related that the evaluation by Etheridge and Herring was on 7/13/89. More significantly, Norris asserts it was above average, and he viewed it as a very exceptional evaluation. Norris received eight satisfactory ratings, four above average, and two exceptional.

Norris recalled that Herring said something about a foreman; but, Norris could not say Herring told him on *that* occasion that the Company was watching him for a foreman's

position. (However, way before this, Norris was aware that they were looking at him for a foreman's position.) During this evaluation, Herring said that they knew what he was doing. Norris was being watched very carefully. Norris summarized the way he (Herring) was expressing it, they're not only watching him at work, they know what is going on outside of his job.

Though Norris was aware that the union activity had cranked up at the time, Norris was not (I find) public with it (his union activity). Though Herring told Norris that Norris had been seen at meetings, Herring would not tell Norris who saw him; nor did Herring tell Norris where Norris had been seen at a union meeting. However, Norris asserts he found that out *later*.

On redirect, Norris related that it was Hayes who later told Norris that Leavitt had seen them at the first meeting. Norris relates he is not scared to talk to Hayes; and, Norris recounts that on a later occasion Hayes let it slip. By relating its occurrence to other incidents, Norris effectively placed Hayes' statement on Leavitt's observance of Norris' attendance at a union meeting, as probably occurring sometime in *January or February*.

Hayes knew that Norris was active in the Union, but does not clearly establish when he first knew it. Hayes asserts that he made it plain with all his employees that Hayes had no hard feelings toward the Union, whatsoever; that it was their decision; and, they're grown men. Hayes has otherwise testified that he never at any time told Norris that Hayes or Leavette were spying on him.

On the other hand, Hayes acknowledged that *it is possible that Hayes told Norris that Hayes knew Norris was attending union meetings*. Hayes then did not recall the circumstance under which Hayes might have told Norris that Hayes knew Norris was attending a union meeting. While Hayes had no recollection whatsoever of ever telling Norris that Leavette knew that Norris was attending union meetings, Hayes did not explicitly deny he made the statement attributed to him by Norris.

Only Herring testified to this incident. BEMC has employed Monte Herring for over 17 years, and in material times as the construction supervisor at Whiteville district. Herring oversees the evaluation of employees. On July 6 Line Foreman Erwin Etheridge conducted an evaluation of Norris. Herring sat in on it. Herring confirmed Norris received an above-average evaluation.

After Etheridge did his evaluation, Herring spoke to Norris. Herring explained that in previous years, Norris had had a little problem with his evaluations, but asserts Norris had done well this year in overcoming some of those problems of the past. Herring also testified that Norris is a hard working employee. The little problems in previous evaluations, were, instead of leading people, Norris was trying to drive them. Herring had men come in and talk to him about this. If Norris became a line foreman he'd have to learn to lead instead of drive. Norris had overcome a lot of these problems by the July 6, 1989 evaluation. In the meeting, Herring told Norris how good a job he had done.

Herring's version of the conversation is that in roundabout words Herring told Norris that he was proud of what Norris had done and that he realized that Norris and his wife were fixing to have a child and said that there would be more re-

sponsibilities for Norris in Brunswick Electric and as a father; and that Herring wanted Norris to be able to accept it.

Herring told Norris that as he was a linemen, if he progressed as well as he had, his next step would be a line foreman's position. *Herring told Norris not to be so naive as to think that the Company didn't know what was going on*. On cross-examination, when asked directly, Herring then acknowledged that they were talking about the Union; and, that Herring meant by the statement, that the Company knew what was going on with the union activity. In contrast, on direct examination, Herring denied he told Norris that he was being watched; or, that he had been seen at union meetings; and testified that he did not hear Etheridge say either statement. Herring asserts none of his superiors had ever told Herring that union activity would effect anyone's promotion.

#### 6. Hayes alleged unlawful interrogation, and threat of loss of benefits on July 27

The complaint alleges that on July 27, 1989, that *District Manager Hayes* interrogated employees concerning their union activities; and, that on July 27, 1989, Hayes threatened employees with a loss of benefits if they selected the Union as their bargaining representative.

Norris also asserts generally he had (other) conversations with Hayes, around *September 1, 1989*, somewhere along there. Norris talked to Hayes on *several occasions*. On one such occasion, *Hayes came up and said that we were going to have to give up something to gain something*.

Hayes did not recall a specific conversation with employees in July, but acknowledged that he had several times had conversations with employees about bargaining and negotiating. The only thing that Hayes felt like that he could say and stay legal was to *define the term "bargaining" for them*. Thus Hayes testified Hayes would explain that bargaining, to him, meant exactly what it does anywhere else, *you start one side here and one side here, and you try to meet in the middle. By meeting in the middle somebody has got to give and somebody has got to take*. On cross-examination, Norris confirmed they were talking about the process of collective bargaining, or negotiations; and, usually, somebody has to give up something to get something else.

When inquiry was then made as to other conversations, Norris testified only generally and essentially that most of the times they were about what was happening; that Hayes knew what was going on; who was involved in meetings; and who was behind it all. On cross-examination Norris acknowledged that was common knowledge at the time; as by then they had already sent the (union) paper into David (Batten).

In brief General Counsel has moved to amend the complaint to delete the allegations of interrogation and threat of loss of benefit by Hayes on July 27, 1989. In light of only the above evidence appearing supportive, and the same being insufficient to sustain the allegations, the amendment is allowed.

#### 7. Alleged unlawful conduct of Foreman Johnson in September 1989

The complaint alleges that in the first and second week of September 1989, Line Foreman Johnson, unlawfully encour-

aged its employees to identify other employees who supported the Union.

The parties stipulated Foreman Johnson read General Counsel's Exhibit 3 question and answer 10 to his employees during first and second week of September 1989, as follows:

Question No. 10: How can I stop some guys from harassing me about the Union?

Answer: Tell them to leave you alone and that you will let them know if you have any questions or need any information. If that doesn't stop it report it to your supervisor. Try to remember that some employees have really jumped on the union thing temporarily, but they will get over it. Try not to let this union deal interfere with your long-term friendships. We can and will overcome this temporary disruption.

#### Analysis of the Preelection Allegations

By calling Smith at home on June 26 after 11 p.m., and by telling Smith that in a conversation with District Manager Hayes held that morning, Hayes had told Coleman to call Smith and tell Smith that an employee had complained to Hayes that Smith had been harassing the employee about joining the Union, and, the harassment had to stop immediately, I conclude and find that thereby the Respondent Employer, in substance and effect, has threatened its employees with unspecified reprisals for engaging in union activity, as alleged in the complaint.

Moreover, I further conclude and find under all attendant circumstances, including, e.g., despite the mutually acknowledged Coleman friendship with Smith; and, even if Coleman's remarks to Smith were accompanied by one or the other statement essentially that Hayes and/or the employee thought a lot of Smith, either of which on this record appears as likely, that Foreman Coleman's statements nonetheless had tended to interfere with, restrain, and coerce Smith in the exercise of his Section 7 rights, cf. *Trover Clinic*, 280 NLRB 6 fn. 1 (1986). (That effect is only the more so rendered likely if the statement had included, "and did not want to see Smith get in trouble," as would also then appear the more likely.) Accordingly, I find that by Foreman John "Reno" Coleman's statements made on June 26 that effectively threatened employee George "Doug" Smith with unspecified reprisals for engaging in union activity, the Respondent Employer has thereby violated Section 8(a)(1) of the Act.

The oral maintenance (if not promulgation) of a singularly encompassing, and thus discriminatory rule (or practice) forbidding talking about the Union (whether expressed as on the job, or on worktime) was clearly related to the above complaint allegation of Coleman's threat of unspecified reprisals for Smith's engagement in union activities. Such a relationship is clearly to be observed from Coleman having urged his call to Smith as intended as an aid to Smith's future avoidance of discipline, if Coleman could effectively do so; and, as Coleman's motivation in speaking to Smith on Hayes account. It was a matter fully litigated herein, *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). A rule or practice that is established as prohibiting only talk about the Union and that is unpersuasively connected in origin to maintenance of production and discipline, evidences the clearest form of discriminatory reason for existence, and it is a violation of Sec-

tion 8(a)(1), cf. *Our Way, Inc.*, 268 NLRB 394, 395 (1983); *Harry M. Stevens Services*, 277 NLRB 276 (1985).

Contrary to urging of General Counsel, and in essential agreement with Employer, I am not persuaded by Smith recollections that Hayes threatened on June 26 (or 27) that if the Union came in, the Company would impose strict classifications and would have to layoff the last three men hired on the yard right-of-way crew. Rather I am persuaded on the weight of what appears as more consistent and credible evidence, in the background of the comparatively new yard right-of-way crew operation and related cross-training, that in the discussion of crew cross-training in which Smith had informed Hayes that the employees did not want to move about from crew to crew in cross-training, Hayes had replied (I find) that strict classifications was something that Hayes would hate to see happen.

The more credible evidence would thus appear to indicate that it would be here the Union seeking strict classifications as a condition of employment, especially in the light of Smith's report of employee deep distaste for the proscribed employee movement from crew to crew in cross-training. Moreover, in (consistently) saying he would hate to see it (strict classifications), Hayes also reasonably explained factually why, and in what is (undisputed) fact, namely that the men on the yard right-of-way crew had been actually hired as groundmen.

Hayes statement of concern is reasonably evaluated in that background, and thus was conditioned (at best) impliedly on an agreement of Employer with a union demand for strict classifications. It is only reasonable in those circumstances, that Hayes has said, if there could not be the continued cross-training, there was then a good chance they (Whiteville) would lose the yard crew operation as the three men had been hired as line crew groundmen who would probably be used elsewhere where needed (if required to work strictly within their classification) as line crew groundmen. I credit Hayes testimony that he did not say, nor I find, under all attendant circumstances, did he reasonably seek to imply the three men would lose their jobs. Accordingly, I shall recommend that this complaint allegation be dismissed.

Etheridge did not testify; and, thus he does not corroborate Herring, whose account of not creating an impression of surveillance I find is less convincing than Norris. In contrast Norris received more support from Hayes than did Herring. Since at the time Norris was evaluated on July 6, 1989, Norris was not as yet open in his involvement with the Union, it was reasonable on the occasion of Etheridge's review and Herring's comments thereat of union activity awareness in general, and of Norris in particular, for employee Norris to believe that his attendance at union meetings, and his involvement in other union activities were under surveillance away from the job. I find Respondent Employer thereby created among its employees an impression that their union activities were under surveillance in violation of Section 8(a)(1) of the Act.

In that regard, and contrary to the related urging of Respondent that because Etheridge did not actually make any of the statements that created the unlawful impression of Employer surveillance, which were all attributed to Herring, the allegation as to Etheridge should be dismissed, I conclude the allegation as to Etheridge should not be dismissed.

Etheridge is not to be absolved of any part in such misconduct where it is he who supervises Norris directly; and, Etheridge is present and remains silent when Herring made the statements that have served to create the unlawful impression of surveillance; and, there is no evidence of employer subsequent repudiation, or of Etheridge's part in an attempt therein.

As employees were being urged to report not just threats, but subjectively perceived union pressures in Batten's letter of July 11, 1989, the Respondent's request to report "Union pressures" could be interpreted by some employees to be broad enough to cover persistent, but lawful attempts by union supporters to persuade employees to sign union cards during their nonworking time and off the Respondent's premises, which would therefore tend to restrain a union proponent from attempting to persuade any employee through fear that his conduct would be reported to management, in violation of Section 8(a)(1), *Arcata Graphics*, 304 NLRB 541 fn. 6 (1991), and see cases cited therein. (It would appear open whether Member Oviatt, who therein held a different view on directed employee report of "abusive treatment," would not nonetheless view the instant directed employee report of more general "Union pressures" as constituting an otherwise unlawful request made to employees to report on protected activities of coworkers.) Accordingly, I conclude and find that on July 11, 1989, General Manager Batten unlawfully encouraged employees to identify other employees who supported the Union as alleged in the complaint, in violation of Section 8(a)(1) of the Act.

Appearing to suffer the same deficiency in interfering with a union proponent's exercise of protected Section 7 rights is Johnson's instruction read to employees during the first and second week of September 1989, on how to stop employee "harassment," namely to, "Tell them to leave you alone and that you will let them know if you have any questions or need any information. If that doesn't stop it report it to your supervisor." I conclude and find that by the above conduct of its Line Foreman Johnson in the first and second week of September 1989, Respondent Employer has unlawfully encouraged its employees to identify other employees who supported the Union in violation of Section 8(a)(1) of the Act, as alleged in the complaint.

### C. Postelection Evidence

Smith's Local union advocacy and prominence in leadership became only the more apparent after the election on September 19, 1989, in which Local 495 was successful in being designated by the majority of the unit employees as their collective-bargaining representative for purposes of collective bargaining. Thus at that time Smith was promptly elected chairman of the bargaining unit; and, as such, Smith thereafter has served as the chairman of the negotiating committee. (The unit chairman is a position elected by employees that work in the BEMC bargaining unit and are members of the local union. In that regard, there are approximately 58 employees in the BEMC bargaining unit, and 42 are members.) As elected unit chairman, Smith appointed all union committees; and, it was his duty as unit chairman to also sit in on the negotiating committee. (IBEW constitution and by-laws of the local union gave Smith such authority.)

## 1. The negotiations background

### a. In general

The parties have stipulated that on October 13, 1989, the Union requested bargaining, and on November 27, 1989, the parties commenced bargaining. The parties had not reached a contract as of hearing. There is no bad-faith, or surface-bargaining allegation in the complaint.

Employer has offered limited evidence on the meetings to show how tension was building up and everybody had to and did tolerate verbal abuses, but with urging in contrast that nobody has to tolerate physical abuses that Employer claims developed therefrom. The Employer's contention is Smith was continually just throwing verbal assaults at management representatives; and, the amount of such verbal assaults had mounted and mounted. More specifically, although conceding there was never physical violence before May 9, Employer argues the supervisors of the Company were subjected to cursing and threats of all sorts as they were trying to leave on January 4; and Employer further argues that (such) conduct continued and finally erupted into Smith's physical violence with Leavitt on May 9. Over General Counsel's objection (made only on the basis that there was no surface-bargaining charge), Respondent was allowed to introduce evidence thereon, but solely for contended bearing on Smith's conduct and his attitude as Smith exhibited it during the course of the negotiations, and, especially, as directed to Leavitt.

Following the election in September in which the Union was successful, Leavitt was put on the Company's negotiating committee to serve with Attorney W. Britton Smith Jr. (who was to lead the negotiations for the Company) along with service of other (varying) company representatives, to negotiate the first contract with the IBEW. (In interest of brevity and clarity, George "Doug" Smith is referred to simply as Smith, and Company Attorney W. Britton Smith Jr. as simply Attorney Smith.)

In addition to Smith, the regulars appearing for the Union's negotiating committee were: International Representative Gene Ruff (who was to lead the negotiations for Union); Local 495's business manager Hatcher; and employees Norris and Ford. Employees Merrill Wilson and Jay Lynn have alternated on the committee; and at one point employee Mark Huick came. (Observers have also been present, on one occasion as many as 14-15 appearing for Union in all.)

In material times there had been nine negotiation sessions, of which, Leavitt attended all but two meetings. Leavitt missed the preliminary one, attended by Attorney Smith, Frank McGougan (corporate attorney at the time), and Tom Ruff, another company attorney from Attorney Smith's law firm. There is some ambiguity whether the Leavitt described preliminary meeting was the first meeting held on November 27, 1989. The second meeting Leavitt missed was on March 9.

### b. November 27, 1989

Though Leavitt at one point appeared to state that the Company had proposed a 12-1/2-percent increase in the November meeting that he did not attend, Leavitt later clarified he knew only a money offer was made, not the percentage. Hatcher also had not recalled if in the very first meeting on

November 27, 1989, the Company offered to place into effect, immediately, a 12-percent increase, if the Union would waive any further economic demands. Hatcher stated, there have been so many offers and refusals and counteroffers that he didn't recall that specific one. Hatcher also did not recall Smith at this meeting saying that the unit employees were going to be very upset if they couldn't walk out of the meeting with a wage increase on the first negotiating day. Rather, Hatcher thought the Union had already talked to Smith and the Union's negotiating committee, and told them that a wage package would probably be the last thing that they would negotiate, and not to expect an increase on the first day.

In general, I credit Hatcher's account of the first meeting of November 27, as not encompassing any Smith statement of disappointment if they did not negotiate a wage increase that day; and, that union representatives had advised Smith and other members of the Union's committee not to expect it. Moreover, I credit Leavitt's corrected testimony (only generally) that Employer initially proposed a wage increase if the Union would forego other economic demands.

Hatcher recalled (I find relatedly) Smith and others at one time getting boisterous and saying, it's going to take a whole lot more, and, the Company's going to have to pay a whole lot more than they ever thought they were going to pay, though Hatcher didn't recall the particular meeting at which Smith made the comment. Smith recalled Employer in fact had later offered a bigger wage proposal, and it also was not accepted. Leavitt otherwise recalled generally (at various meetings) that Smith had said variously that wages were not fair; they were not enough; that the wages were low; and wages needed to be changed. Indeed, Leavitt acknowledged at a later meeting they (the Company) proposed an additional 2 percent. Leavitt asserts he did not say Smith was disruptive in making comments about wages. Leavitt complains that Smith made accusations and threats; and, that Smith called (people) names.

#### c. December 21, 1989

Leavitt and Oakland District Manager Hughes were present as the company representatives at the meeting of December 21, 1989. Leavitt recalled that at this second meeting, Smith stood up and talked to McGougan, corporate attorney, and made reference to some action that had taken place at a North Carolina boys' home. As Leavitt recalled it, Smith suggested that a committee of the boys' home employees had gotten together and formulated an ouster of the director there; and, Smith then said, that's what he was planning to do, and that Hughes and Leavitt would be fired.

Hatcher *did* recall a discussion about the North Carolina boys' home in the meeting on December 21, 1989, but not any conversation about how the employees there had gotten rid of the management at the boys' home. Hatcher did not remember (but did not deny) Smith look over at Leavitt and Hughes and tell them he would see them fired just like the boys' home situation. In this instance I credit Leavitt's above specific recollection.

#### d. January 4, the Ramada Inn

Leavitt and Hughes attended the next meeting held on January 4 at the Ramada Inn, Wilmington. It was the one and

only *night* negotiation meeting held. Leavitt recalled that as they were going into the meeting, *Smith said he wondered why Attorney Smith wasn't in Miami, defending Noreiga.* (Smith had earlier recounted the remark as occurring at a more cordial time, and in jest, with Smith first stating he was surprised to see Attorney Smith there, and upon Attorney Smith's inquiry why, Smith said, "Well, I thought you'd be in Miami representing Mr. Noriega.") Leavitt recalled when the meeting got heated *in the end*, that at that point Smith looked at Attorney Smith and then said to him, "were you born an asshole, or do you just work on it." (Smith earlier had candidly corrected a related inquiry on cross-examination, with counsel then statement of agreement, that Smith had said, "Were you born an asshole, Britton, or have you just worked at (it) all your life.")

Hughes related when the meeting had ended, and Hughes was getting his books up off the table and as they were turning to leave to go to the door, *Hughes heard the comment, "That's all right, you all go ahead and leave, you assholes;"* and, Hughes asserted that it was Smith he had heard say it. Smith didn't recall calling Hughes (or Leavitt) either "assholes" or "shits."

Norris wouldn't say (agree) there was a good deal of cussing of Employer's supervisors at the end of this meeting. Norris remembered he had talked about the supervisors; and, he didn't use any profanity towards them. While Norris has stated (only) that he didn't remember any of the supervisors being called profane names that night, Norris testified that he was sure he didn't remember somebody call Hughes an asshole.

It is notable then that Leavitt recalled that at the end of the meeting employee *Wilson had addressed a question to Hughes, and finished the question by calling Hughes an "ass or shit or something";* and, that at that point the Company had gathered its material and headed for the door. Leavitt recalled additionally only generally that as they were exiting, they were again called names. In light of Smith's candid admissions above (and elsewhere), and Wilson shown as more likely source of the Hughes recalled statement, in this instance I credit Smith that he did not *call Hughes* an "asshole or a shit."

Leavitt otherwise acknowledged on cross-examination that this meeting started late; and, it wasn't the Union's fault. Leavitt explained the meeting started late because the attorneys' flight in from Charlotte was delayed and didn't get in until almost 6 p.m.; and they had to first go pick them up, and, then come on in to the Ramada. Leavitt relates (on arrival) they had briefly talked about some issues; and, then, as usual, they went over highlights of the Company's counterproposals. The Union asked for a caucus and the Company walked out, at roughly 7:30 p.m. (Hatcher recalled that they were supposed to meet at 7 p.m., and, otherwise confirmed that the Company was late. Hatcher also recalled that the Union *didn't* go into a caucus at 7:30 p.m., but at 7:45 p.m., though Hatcher acknowledged that they were still in caucus at 9 p.m.)

Leavitt recalled that after waiting an hour and a half, the Company came back and said that it appeared that the Union needed more time (confirmed by Norris and others) to review the Employer's counterproposals; and, suggested they schedule the next meeting. (Norris confirmed not much was accomplished that night; and, that the Company wanted to re-

schedule to another date.) In confirming, Hughes states they could see the Union hadn't come to a conclusion or agreement on any of the things they were discussing. At that time, and notwithstanding any assertions of Hughes (or Leavitt) to the contrary (I find) *the Company had decided that it was time for them to leave.*

Thus, Hughes has acknowledged on other occasions, we (the Company) saw that we weren't getting anywhere; and, we made the decision, yes, that it was time for us to leave. It was at this juncture that the above-described employee boisterousness and profanity had occurred. Although Hughes had denied that the context in which (assertedly) Smith had made the above statement, "Well, go ahead leave, you assholes," was the Company (after having arrived at the meeting late) ending and leaving the meeting before the Union wanted them to, even if that remark occurred, I find it occurred in that context. Moreover, that circumstance was clearly not the only point under heated discussion.

Leavitt credibly related a discussion had erupted about why the Employer wouldn't pay the employees. Leavitt recalls Ruff started the discussion, and then Norris, Wilson, and Smith had something to say about why won't you pay these people. Everybody was getting their two-cents worth in. Then, the issue changed; and, everyone was talking about why couldn't we have these (meetings) at night; why couldn't we have them on the co-op property or premises; as well as why couldn't the employees be paid; and, it got rather heated. Norris confirmed the whole room was a little boisterous; and, to a certain point it got a little out of hand. Hatcher affirmed when they came back in and tried to reschedule a meeting, that there was a discussion about the employees not being paid for negotiating. The union committee employees wanted to be paid for the time in negotiating; and, BEMC's position was it was their and the Union's time; and, the Union paid.

Smith recalled it as at this meeting that in discussing a proposal at the end of the meeting, someone from the union side had said that the Employer had done something for the clericals; and, that Attorney Smith responded in a rage, they were not negotiating for the clericals. Smith acknowledged that he had said, "Well, that is fine, we'll just organize the clericals and bring them into hear [sic, in context the] contract." Seemingly in those circumstances, Smith relates he was drawn out to say, "We will not meet with you again until we organize the clerical workers, if it takes three months." Smith did not accede to company suggestion he was thinking of another meeting.

However, Norris did not recall Smith *at this meeting* refusing to even talk about rescheduling a meeting until Smith could get the clerical employees organized. Norris acknowledged he had discussed that subject with Attorney Smith, but Norris didn't recall it as coming up that night. Norris otherwise affirmed at the tail end of this meeting Norris had a few words to say (in the above matters), as did everybody on both sides.

On weight of credited evidence of record, I find Smith's statement about organizing the clerical workers, probably didn't occur in this meeting; but in a later meeting, either January 12 or 29, and more likely January 12, but if not, then in the abbreviated meeting held on January 29 when the Company ended a meeting understrained circumstances with the Union to be described below. I am in any event con-

vinced it occurred before February 15 when (as I find below) District Manager Hayes first interrogated a nonunit clerical employee about the subject of clerical union activity. Though Smith and Norris did not recall that Smith said the employees wanted to go out and inform (BEMC) members about BEMC not paying them for negotiating, so they could get a Board that would pay them all to negotiate, Smith essentially acknowledged that he said something like that, and, given the background of the above circumstances I find he did.

Hatcher, with reason, did not remember that as the co-op tried to leave the meeting room that Smith had referred to Leavitt and Hughes as "shits and assholes." Hatcher less convincingly did not recall what led up to Employer's leaving the meeting. However, Hatcher has testified without contradiction, if not with admission, that Hatcher thought that it was on January 4 that Attorney Smith had also called Hatcher a "son of a bitch." Hatcher otherwise testified both significantly and convincingly that there were insults and profanity used by both parties throughout the negotiations; further asserting that that is normal in negotiations; and, adding that they try to hold it down as much as possible, but you get some insults here and there.

Norris recalled that the difficulty in scheduling another meeting with Employer at the end of the January 4 meeting happened between Ruff and Hatcher; and, Norris wasn't involved in that at all. Hatcher has testified relatedly that it is not correct that BEMC was trying to reschedule another meeting, and the Union wouldn't do it. Though Hatcher acknowledged that he and Attorney Smith had to correspond by letter to reschedule another meeting after that meeting, Hatcher added his recollection of the meeting was that Attorney Smith had folded his books up abruptly, and said we're gone, we're leaving. Indeed, asserting he knew it was just a little upset tension there, Hatcher specifically recalls he had at that time said to Attorney Smith, let's go ahead and schedule another meeting. Hatcher explicitly denied Attorney Smith had replied January 12. Rather Hatcher recalled Attorney Smith just said to call him. I credit Hatcher's account as being the more likely manner of arrangement of the next meeting.

#### e. January 12

Leavitt recounts credibly that for the next meeting, the Company came with a one-speaker rule. Leavitt asserts, the one-speaker rule was proposed by the Company to expedite the bargaining process, to direct all of the Union's table, and all of the Company's table through one speaker, respectively, so that they could facilitate getting something accomplished, as up to that point, they had gotten very little accomplished. Leavitt believed after the situations that arose in the first two meetings that it was going to be necessary for them to limit the number of speakers. Leavitt didn't believe management had a right to tell the Union how their committees should be operated; but he believed the Company had the right to help to facilitate the discussion; and, they needed to set some ground rules to be able to do that. Leavitt guesses (sic) they tried to negotiate that ground rule; and, it was rejected.

Hatcher acknowledged that at the next meeting of January 12, the Company had told the Union that BEMC would no longer tolerate roundrobin negotiations; that they would no longer tolerate verbal abuse; and, that they were going to a one spokesman rule. The Company's position was then that

no one was to talk in negotiations except Attorney Smith and International Representative Ruff. However, the Union replied, (essentially) if the Company wanted to gag their negotiating committee, that's fine; but there was no way the Union was going to gag their negotiating committee.

Smith understood the law did not require the Union to adhere to it; that it was imposed just to restrict the Committee's talking; and, in his opinion it wasn't necessary.

Leavitt recounts that the Company left the room on a caucus. They had some counterproposals. Leavitt relates Ruff came out and spoke to Attorney Smith, and said in theory he agreed with the one-speaker rule, and he would try to abide by it, but he had to check with Hatcher to see if he agreed. On cross-examination, Leavitt confirmed that was the only time Leavitt had witnessed a discussion about the one-speaker rule, namely, when Ruff had come in the hall while Leavitt was standing with Attorney Smith, and Ruff had said, he agreed in theory that it would help move along the meetings, but Ruff could not speak for the entire group; and Ruff needed to discuss this with Hatcher. So Leavitt guessed Ruff had never agreed to the gag rule. Ruff did not testify; and, I credit Leavitt account to the above extent of a Ruff statement of his personal approval of such a rule as made to them. However, there is no viable question that the Union never agreed to Employer's proposed one spokesman, or gag rule.

Hatcher did confirm that the union committee discussed it among themselves to try to keep negotiations moving swiftly. Though Hatcher did not recall Ruff say on a couple of occasions that Ruff would try his best to observe the one spokesman rule; (or) that he knew it was out of hand and that we (seemingly both parties) couldn't negotiate; and, that he would try his best to observe it, Hatcher testified categorically Ruff had not put any stipulations (sic, restrictions) that the committee (members) could not speak. I credit Hatcher's further *well corroborated* testimony that the Union said we had never gagged our committee, and we don't expect you (Employer) to gag yours. When Hatcher was asked relatedly didn't he tell Attorney Smith on a couple of occasions that he was having a little bit of trouble controlling those men, Hatcher responded, he didn't recall that; that he didn't have any trouble controlling them; and, that he had told Attorney Smith, I can control them.

Leavitt recounts this meeting was very productive; and, it was one of the few that they began to sign off on some things. Hatcher candidly acknowledged when they got into the negotiations that day, they agreed on at least five or six proposals; and, they all felt good about that day, as they had made some progress.

#### Smith's developing difficulties on the job

On cross-examination Smith testified that he had been aggravated with Cartrette on the job; and, on January 17 he came into work (still) aggravated with him. After a few minutes, Smith asked Cartrette for, and received a day's vacation off. Hayes made a record of a Cartrette report that was made to Hayes that afternoon that Smith had come into work that morning with a very negative attitude towards the "whole world," cursing and carrying on, but not about any person in particular; and the two agreed that it would be best if they talked to Smith the next morning.

Hayes has recorded a note that the three met on January 18 about Smith's "attitude towards his job and BEMC as a whole." Hayes also noted that in that conversation, Smith told them he had a lot of personal problems that were not associated with the Company; and admitted he had to quit "bringing them to work with him." Smith asked for and received a further day off.

Smith acknowledged that in a subsequent conversation with Hayes he had told Hayes he was having personal problems, and also, that he had said at that time that it didn't have anything to do with the Company, though (at hearing) Smith stated that was not totally true. Smith's recollection was Hayes told Smith he was going to have to quit bringing them (problems) to work. Smith acknowledged both said they agreed to work with Smith, but asserts that was only what they said; and, in contrast, Smith asserts Hayes knew, or should have known, Cartrette was very good at badgering people; and, that that was what was going on all along.

#### f. January 29

The Company terminated the meeting on January 29 (assertedly) because the employees violated the Company imposed one spokesman rule. That was the second time the Employer had terminated a meeting. Leavitt explained (generally) that their position was not to unilaterally walk out anytime, but rather it was, if they couldn't negotiate under reasonable conditions, then, they would walk out. Thus, they evaluated conditions; and they determined when they would walk out.

Over objection of General Counsel that the charge filed was of surface bargaining, Leavitt testified that there were 10 charges filed, one of which was the Company's unilateral imposition of the one spokesman or gag rule, and that, after an investigation of the charge(s), the NLRB (General Counsel) did not issue a complaint on the Company's alleged unilateral imposition of a one spokesman or gag rule.

Whether the Company's imposition of a one spokesman or gag rule violated Section 8(a)(5) is not an issue placed before me. However, it is warranted to consider and conclude even at this juncture that to extent a gag rule has been advanced in connection with Smith's participation in the negotiations, that circumstance does not by itself render Smith's continued conduct in a participation in the negotiation sessions any the less protected, where the gag rule was a condition or procedure rule never agreed to by the Union and thus never engrafted on the collective-bargaining process. Moreover, while assuming, and not condoning any profanity (or excessive statement of his intentions in regard to management) Smith may have uttered as is attributed to him above, Smith clearly did not exceed bounds of protected activity in his participation at all the above bargaining sessions, even assuming (without finding) Smith was one who had at the end of the heated January 4 meeting said to the departing management group, "That's okay, you all go ahead and leave. you assholes."

#### 2. Alleged interrogations by Hayes in February-March

The complaint alleges that in late February and early to mid-March, that Whiteville District Manager Hayes interrogated employees concerning their union activities.

Nellene Holden has worked in BEMC's Whiteville district office for 22 years as a credit representative, under supervision of Office Manager Harlene Walters. Holden is not a member of the bargaining unit represented by IBEW, but has signed an IBEW union card. Holden attended a union meeting that was held on February 19, a Monday night. Present at that meeting were a group of clerical employees, as well as some of the members of the bargaining unit.

Holden was approached prior to that meeting, she believed on February 15, by Hayes in her office. Hayes asked Holden how did she feel about the Union. Holden told Hayes at that time she did not know, that she planned to attend a meeting and learn what she could and that she would make up her own mind. As best she remembered Hayes then said, that's what I need to know. Holden attended the meeting, accompanied by one other employee.

Hayes confirmed a conversation that Hayes had with Nellene Holden about the Union, placing it in mid-March (sic). Holden was in his office using the fax machine, as she does daily. Hayes asked something to the effect, "Nellene, how do you feel about the Union?" Hayes offered explanation that at the time he thought he could do that, though he knew it was a no-no with employees in the bargaining unit, because they had been through "TIPS" (instructions not to threaten, interrogate, promise, or spy), but Hayes repeated he was not aware that he could not do it with non-bargaining unit people either.

Hayes recalled Holden explained to Hayes her husband was in the Union with the telephone company, etc. Hayes replied "Nellie, that's good. Everybody needs two sides. There's two sides to every story and you need to get them." According to Hayes that was the extent of that; though Hayes didn't remember the whole thing (conversation). Hayes denied that Holden told Hayes any other information about what was going on; and, Hayes didn't ask (at least in this first conversation).

However, Holden continued she had a subsequent conversation with Hayes about the Union, probably on the following Wednesday, February 21, in Hayes office. They were alone. Holden was in the office using the fax machine. She did not bring up the Union. Holden stated credibly that she waited for, and only answered Hayes' questions.

This time Hayes asked Holden what she could tell him about what was going on with the Union. Holden said, I really do not know, or the only thing I know is I attended the meeting on Monday night. Hayes asked Holden approximately how many people were there; and, Holden told Hayes, 15. Hayes then asked Holden what offices were they from; and, Holden replied all offices; and there was some from each office. Holden relates Hayes then asked Holden what they discussed. Holden told Hayes that they discussed labor laws. Hayes asked Holden if she knew if the Company was breaking any laws. Holden said she did not know; and that was all that was said. (On cross-examination, Holden has congruously confirmed she and several other employees had interest in the Union on February 21; and, she did not know whether any of the other employees had talked to Hayes about the Union.)

Hayes confirms he had another conversation with Holden, though placing it somewhat indefinitely on the next day, or a short time span thereafter. Hayes remembered asking Holden point blank, "Nellie, am I doing anything to break

NLRB rules?" Hayes asserts he wanted that for his own constructive criticism; and, that most people knew he was very vocal in his office and he sometimes runs his mouth too much, and he wanted to be very careful. Holden said, "No, I know of nothing that you're doing."

In this matter, I credit Holden's version in full. Moreover, I have found Hayes' inquiry followed stated Smith intention to organize the office clericals, as expressed to management in attendance in January negotiation session. Hayes subsequent interrogations of Holden were neither casual of Holden nor limited to her interest in the Union, but rather, as continued, took on clear probe of the degree of interest of office clerical employees in the Union generally; across departments; and, of the nature of activities in the union meetings.

As it is clear Holden had not been initially open in her (or others') union activities, sympathies, and interests prior to Hayes inquiry(ies) of her thereon in his office, I conclude and find that on February 15 and 21 Hayes interrogated employees about their union activities, sympathies, and interests, in violation of Section 8(a)(1) of the Act, *Rossmore House*, 269 NLRB 1176 (1984). It is concluded as well that Smith's recent statement of an intent to organize BEMC's office clerical employees had likely promoted Employer's interest and concern in that area.

### 3. The alleged bargaining futility statements and harassment of Smith on February 28; and, alleged discriminatory suspension of Smith on March 5

#### a. Preliminary observations

The events occurring at the end of February and early March, leading up to the suspension of Smith on March 5 (and circumstances of a physical altercation that developed between Smith and Leavitt in the negotiation meeting held on May 9, that lead up to discharge of Smith on May 10, below) were the most contested and litigated events that are placed in issue by the complaint's allegations.

The credited facts bearing thereon are in the end determined only after a marshal of what appears to be the more mutually consistent and corroborative evidence, with however, certain undeveloped innuendoes in the evidence left of record winnowed out; and, then, with appropriate attention and weight given to apparent inherent probabilities, and, as well, to the fair import or inference from any observed major inconsistencies. Where the demeanor of a witness is deemed to be the controlling factor on any area of fact found, it is clearly stated, with reason therefor.

#### b. Cartrette's alleged bargaining futility statements, and harassment of Smith on February 28

The complaint alleges that on February 28, Line Foreman Cartrette harassed an employee because of his union activities; and, expressed to an employee the futility of selecting the Union as a collective-bargaining representative.

By this time, Smith had worked with the heavy equipment right-of-way crew under Cartrette for about 2 years. Cartrette testified that when Smith first started working with Cartrette, Smith performed his job right; and, Cartrette thought he was a fine employee. Indeed, Stevens, with whom Smith regularly worked, testified that he regarded Smith as fine a man as Stevens had known. With that background, and given Smith's interim increasing prounion prominence and the Re-



spondent Employer's (and Stevens) demonstrated animus to the Union, inconsistencies in Cartrette's, Hayes', and Stevens' testimony on Smith's asserted developed poor job performance take on added significance.

Cartrette relates Smith had first started neglecting his job duties after the union negotiations started, recalling it as just prior to the first of the year, settling on late November or December. The first recorded Smith deficiency after Smith's exemplary appraisal in February 1989 (apart from an auto accident involving backing his truck into a post in the field, on which Smith was charged with negligence in April 1989), was on a Cartrette reported and Hayes recorded perception of an improper Smith attitude exhibited to job and Company on January 17-18. This was in time well into proven difficult first contract negotiations, and at a time when Smith (and union committee) had already evidenced that he (it) was not content to play the passive negotiating role Employer had urged and pressed upon him and the Union in January.

Negotiations were again scheduled for the morning of February 28. As chairman of the negotiating committee, Smith had to attend. Smith had a week earlier arranged (with Cartrette) to be excused from work by the Company for that purpose. Employer canceled the meeting late on February 27. Hatcher called later that evening and left a message for Smith that the Company had canceled the negotiations scheduled for that (next) day. (Smith relates he received the message only that morning, between 7:15 and 7:30 a.m.) After first confirming the meeting was canceled with another employee committeeman (Norris), Smith went to work, arriving, as Smith recalls (and I find) at the (Whiteville) office at 8 a.m. Smith's normal starting time was 6 a.m.

Norris is a union designated but not as yet contractually recognized union steward as well as appointed to serve on Union's negotiating committee. Norris had also arranged to have February 28 off because of the scheduled negotiating meeting. Norris recalled his wife had given, or put a note on a home bulletin board that the negotiation meeting was canceled, which Norris (also) had only first noted that morning. Norris has corroborated that Smith called Norris about 7:15 a.m.; and, that Smith had then asked Norris if Norris had found out about the meeting being canceled. Norris replied that he had just found out. Smith then asked Norris if he was going to go to work; and, Norris replied he was, because he didn't have to be there until 8 a.m. Norris works an 8-hour day starting at 8 a.m. Norris knew that Smith worked a 10-hour day, but didn't know whether Smith started at 7 or 6 a.m. (as is actual). Norris also confirmed Smith said he would go to work too; and they both did, but separately. Norris went to work at his normal time. Smith was unquestionably late.

On arriving at the office, Smith first observed his service truck was gone. Smith prepared his foreman's service truck. Smith then went out to the jobsite, where Smith exchanged trucks with Foreman Cartrette. Smith relates Cartrette first instructed Smith to go on down the road and open a gate so that the heavy equipment (Steven's Kershaw) could enter. Smith did as instructed.

Cartrette relates he had not expected Smith to come to work on February 28; and, he had thus planned his workday without Smith. However, Cartrette confirmed this was because Smith had informed Cartrette they were going to have a negotiating meeting that day; and, Smith had said he

wouldn't be there on that account. Most of the time Smith worked with Stevens; and, at least in the last few months, Cartrette (essentially) hadn't been working with (near) them.

In operating the Kershaw, Stevens cuts (or bush-hogs) right-of-way up under the powerlines. Smith's responsibilities as groundsman were to shrub (i.e., chop bushes) around light poles and around the guy wires, and to ride up ahead of Stevens and check the right-of-way. Cartrette was doing Smith's job that day rather than running the clipper (ahead) as normal. Cartrette stated it did not upset him to be doing Smith's job. Cartrette recalled Smith came to work late. At hearing Cartrette (erroneously) placed it later, i.e., somewhere between 9 to 10 a.m., rather than what appears more likely on weight of more credible evidence, as between 8 to 9 a.m., and probably closer to 8:30 a.m. when Smith first showed up in the field for work. E.g., Hayes has recalled, that in Cartrette's report of the incident to Hayes (below), that Cartrette had then placed Smith's arrival in the field between 8:30 and 9 a.m.; and Norris had a compatible recollection of being called by Smith (below) about 45 minutes to an hour after Norris had arrived at 8 a.m.

Cartrette has related that his *first* contact with Smith on February 28 had actually been earlier that day, when Smith had called Cartrette *on the truck* radio and asked what his location was. Cartrette told Smith right where they were, and, then asked (only) if Smith were coming to Cartrette. In a few minutes Smith had arrived. When Smith drove up they switched the trucks; and, Cartrette took the (foreman's) truck that was regularly assigned to him. (The truck Cartrette previously had and which he exchanged with Smith was a truck designed to stay with the bush-hog.)

At this time Cartrette's (heavy equipment) right-of-way crew was working in a fenced area where they had lines, and, Cartrette confirmed that after they switched the trucks, Cartrette told Smith, let's go around and open the gate for Wendy (Stevens) where he can go through with the machine. Cartrette says they did, and waited until Stevens got in and he was (again) cutting in the right-of-way.

After Smith opened the gate, Smith's version has Cartrette pull in several minutes later, get out of his truck, and come toward Smith, who rolled down his window as Cartrette approached him. Smith relates *Cartrette then told Smith that he was going to have to get on Smith about doing his job.* Smith promptly replied, "Floyd, I'm doing my job as good or better than any of your past groundsmen out here." Cartrette has confirmed that he walked up to Smith and started talking to Smith about his job performance. *Cartrette asserts Stevens had told him that Smith wasn't doing his work, which Cartrette says he knew too, so Cartrette just spoke to Smith about it.* (The several material aspects of the subject of Smith's job performance are more conveniently to be discussed below.)

Smith has Cartrette reply, "You beat all I've ever seen. You've got Wendy about ready to quit. *Since you and the Union has been here, you haven't been anything but trouble (or, on other occasion, haven't done nothing but caused trouble). If you or anybody else thinks they can do better, you should quit and find you another job.*" Smith then said, "Well Floyd, the Union has already done good. It's already gotten you a two to three dollar an hour raise in the dental plan." Smith has Cartrette reply, "No, *what's going on is you and the Union are trying to take over the Company.*

*That's not going to happen and you're not going to get anything."*

Cartrette has specifically denied he said, "*You and the Union have caused nothing but trouble since you've been here(;)*" and, denied he said, "*You and (the) Union are trying to take over the Company and you're not going to get anything(,)*" (sic) with Cartrette asserting, I didn't breathe the word "Union." Smith has explicitly denied that he brought up the Union.

Cartrette acknowledged he did say to Smith, "You beat everything I've ever seen." Later, though lead in part, Cartrette related, best he can remember, he had told Smith that Smith had Wendy (Stevens) so upset he was ready to quit the job and leave (but adding) on account of the way Smith was putting pressure on Stevens by Smith not doing his work like Smith should. Cartrette recounts he asked Smith, why Smith didn't go ahead and do his job (or work) and save us all (or save me, Wendy and all the rest) a lot of problems. Cartrette relates that Smith then asked what Cartrette was talking about: and so Cartrette told Smith the best he knew, and Cartrette states generally, one thing had led to another.

On subject of Smith leaving the job, Cartrette's version is that *Smith had first told Cartrette the Company could pay him more, and they weren't paying Smith what Smith felt like was right* and all, so Cartrette had then told Smith, "Well, I'd leave then. Go get me another job, if I felt that way about the job." On other occasion Cartrette related the best he could remember, he did say "*he (Smith) had caused trouble,*" but with Cartrette (again) relating that the kind of trouble Cartrette had there referred to was Smith causing Stevens to feel it was going to cause Stevens problems if Smith didn't do his work.

In contrast, and in what can only be viewed as then revealing that there was a specific and significant discussion of the Union in the conversation, *Cartrette acknowledged that in Smith saying "Look what they have done for you," Smith was referring to what the Union had done for Cartrette; and, Cartrette told Smith on that occasion that the Union had done nothing for him.* Though Cartrette hastened to add he didn't use that word (Union), and he had just said, they hadn't done a thing for me, Cartrette's testimony in this respect appeared as at best strained, if not contrived in his attempt to preserve that limitation of not saying the word Union. However, Cartrette's acknowledgment appears to be itself predicated on earlier discussion of the Union. To the extent the Respondent would seek to rely for support of a contention Cartrette did not mention the Union in this conversation, on a prior Cartrette decision (assertedly made contrary to superior instruction, and for fear of his being misquoted and written up), not to read some preelection campaign material in September 1989 to his crew of two, which notably then was composed of Smith as leading union adherent, and Stevens who did not favor the Union, the same is deemed wholly unpersuasive of that purpose.

To the contrary, I find Cartrette's account of the conversation in the end has in large measure tracked Smith's account; and, to the extent it has varied, it appears as not as internally consistent as Smith's account; and, it does not in any event discount the fact that the Union was a substantial part of the conversation. Moreover, Cartrette continued on an occasion of just such divergence from Smith's account, then to appear

disjointed in his memory of the remainder of the conversation, or what next occurred. Smith's account simply appears more internally consistent and convincing than does that of Cartrette, particularly on the contributing part that Smith's proffered justification for union negotiations on linemen's pay played in the conversation's abrupt end.

Cartrette acknowledged that Smith was pretty vocal for the Union. In that respect, Cartrette asserted a man's opinion about the Union didn't make that much difference to Cartrette; and, Cartrette said if people want the Union, that's fine. However, Cartrette also acknowledged: *that he was against the Union; that he didn't believe that the Union—can really do anything for people; and, notably, Cartrette emphatically agreed that since the Union has come to BEMC, Cartrette has had lots of problems.* Smith's account, in that it has attributed to Cartrette a statement of a joinder of trouble or problems to Smith and union arrival, is far more supported on the record than any Cartrette asserted deference to Smith's support of the Union.

Under all the above considerations, Smith's testimony is more internally consistent and convincing in evidencing the true nature of the conversation as supporting the complaint's allegation of Respondent Employer's harassment of Smith and bargaining futility statements, and I credit it in the main. Thus, I find during the conversation, Cartrette told Smith (essentially) *since Smith and the Union have been here, Smith hadn't done nothing but cause trouble; and, in relatedly saying, if Smith or anybody else thought they could do better, you should unite and find you another job,* Respondent Employer has thereby coerced and harassed Smith in regard to his union activities, in violation of Section 8(a)(1) of the Act, cf. *Seville Flexpack Corp.*, 288 NLRB 518, 532 (1988).

Under the above circumstances, I also find Cartrette told Smith that he and the Union were trying to take over the Company, and that was not going to happen. Furthermore, though not without some reservation, I credit Smith and I find that *Cartrette also told Smith that they were not going to get anything.* (A reservation on the latter arises from surface inconsistency of such a remark with an Employer's wage offer increase that was initially placed on the table. However, Employer's wage offer(s) to date was (were) deemed inadequate by Smith and the Union, and were not accepted by the Union. Indeed, Stevens confirmed Smith had told him on the job that they were going to go for it all, meaning, go for all their wage demands.)

Even assuming, without so finding, that Smith had in some manner in the conversation brought up his own wage rate as being illustratively low, as Cartrette has recalled he did, in all the above circumstances, including of Foreman Cartrette stating to Smith, at a time when Smith was known by Cartrette to be actively engaged in ongoing negotiations with Employer (and, materially, continuing to evidence his firmness on the Union's demands for wage increases), that if he (Cartrette, but clearly being urged for Smith action) felt that way (underpaid), that he would leave and go get another job, I conclude and find Respondent Employer has thereby, in substance and effect, told its employees that their continued collective bargaining on the subject of wages (even if as then to be considered applicable, i.e., beyond the wage offer of Employer) was futile on their part, as is essentially alleged in the complaint to be in violation of Section 8(a)(1). The violation is made in either urged eventuality.

Despite Smith account of Cartrette's upsetting tone and hollering voice, Smith pressed on with a protected expression of his perceived need for the Union and collective bargaining on employees' wages with additional statement, "Floyd, it's a shame what first class linemen make at this Company." Smith recounts Cartrette then stepped up to his window and said, "There aren't any first class lineman (sic) that works for Brunswick Electric." Though acknowledging he had heard it before, and that he was hurt, Smith denied he cursed on this occasion. Smith's version is he said, "Floyd, I don't have to take this; I'm going in."

In contrast, if reflecting a more likely Smith response (with Employer's witness Stevens' characterization of Smith's common usage of cursing, below), yet also then preceded by an instance of simply incredulous forgetfulness on Cartrette's part, Cartrette has asserted he forgot exactly what he had then (first) said to Smith, but recalled (initially) Smith then said to Cartrette, "F\_\_ you, no g\_\_ d\_\_ body can't talk to you. no way, f\_\_ you." However, in later testifying essentially otherwise to the same, Cartrette then left off the "F\_\_ you" brackets. Hayes offered no effective corroboration. Hayes recalled it later reported to him by Cartrette not only inconsistently, but also too tentatively and I find unconvincingly, as having involved a "m\_\_ f\_\_ (expletive)," or something to that effect. I do not credit Hayes' recollection of what Cartrette had told Hayes, Smith had (profanely) said to Cartrette.

Stevens initially recalled Smith just went in there ripping—cussing and all. However Stevens, who was too far away to hear the conversation, clarified on cross-examination, *Smith's usually cussing*, but if he said Smith did cuss, he had better take that back, because he did not know that. However Stevens knew Smith went in there very emotional, because he was upset. I find both Cartrette's statement in nature of a first class lineman aspersion (as Smith at least surely viewed it), and *some* form of profane response as is reported by Cartrette, but without the "F\_\_ you" brackets' embellishment, more likely than not had then occurred. However, I also find Smith's likely profane response of "No g\_\_ d\_\_ body can't talk to you, no way," as said to Cartrette was one not only stated in a conversation in which Cartrette had already made harassing reference to Smith as causing trouble with the advent of the Union, and the coercive bargaining futility statement to Smith in violation of Section 8(a)(1) of the Act, but was said in direct response to a statement Cartrette had made to Smith in further provocative manner, clearly demeaning other unit employees in matters of union negotiations.

### c. The alleged discriminatory suspension of Smith

In interest of ready comprehension of the subsequent material incidents in conflict, Employer's discipline of Smith is presented at this juncture. The complaint alleges that on March 5 Respondent Employer issued a discriminatory suspension to Smith. On Monday morning, March 5, Hayes met with Smith in Hayes' office. (Also present were Cartrette and Norris.) Hayes had a prepared written warning (R. Exh. 3), which Hayes read to Smith. Hayes then suspended Smith for the week. Hayes summarized: Smith did not like it; Smith thought he was being picked on, and abused; and Smith refused to sign the warning. Hayes relates Smith did not react in the same way that Smith had on February 28.

### (1) The suspension and warning given

The warning was checked for Smith's misconduct in tardiness, attitude and disobedience. It otherwise provided:

The Cooperative has thoroughly investigated your conduct of February 28, 1990. This is to advise you that you will be suspended without pay for four (4) days, beginning Monday, March 5, 1990, and ending on Thursday afternoon, March 8, 1990. Your file currently contains a warning for negligent operation of a Cooperative vehicle leading to an accident in April 1989. In addition, you were counselled on January 18, 1990 about your attitude and your problems with BEMC as your employer.

Your conduct on February 28 evidenced the following specific work rule violations:

1. You were insubordinate to your supervisor (work Rule 3).
2. You damaged Cooperative property (Work Rule 11).
3. You used abusive language toward your supervisor (Work Rule 13).
4. You failed to report to work on time without explanation (Work Rule 18).
5. You left work without authorization (Work Rule 20).

Equally serious is your display of temper and profanity in the presence of office personnel and consumers of the Cooperative. This conduct will not be tolerated in the future. This is to advise you that any violation of any work rule, or any conduct such as that which you displayed on February 28, in the next twelve (12)-month period will lead to your immediate termination.

It is warranted to observe at the outset that there is no job performance criticism presented in writing as a reason for the disciplinary actions taken on March 5, though that was what purportedly precipitated the Cartrette-Smith confrontation on February 28 (above), and what Hayes asserts he had further investigated in the interim (below). The related events of February 28 and subsequent days now continue.

### (2) The heated discussion in Hayes office

Cartrette relates that in the field, Smith had jerked his truck in reverse and left digging out of the gate; and, Smith went spinning off with his truck. (In as much as Cartrette has effectively conceded that Employer's placement of Smith's truck in for major repair 2 days later was required as in normal maintenance, I do not pursue Cartrette's, or any other witness' observations, e.g., Ward, on Smith's use of the truck this day.) Cartrette did say he had not given Smith permission to leave; and, contrary to Smith claim that Smith had said at the time that he was going in, Cartrette asserts Smith didn't say where he was going. In contrast, Smith recounts, on leaving, Smith got on the radio and called Hayes. Smith told Hayes he was coming in; that Smith needed to talk to Hayes; and, Hayes said he would be waiting on Smith. Smith called Norris, as union "job steward" for the Whiteville district. On arrival at the office, Smith parked his car in back; and then went in.

Cartrette testimony reveals that even before setting out, Cartrette had decided to call Hayes. Cartrette otherwise as-

serts he got in his truck and started out after Smith, intending to follow and see which direction Smith went. Cartrette stated (only) he could not communicate with Smith's truck. When Cartrette arrived at the second (paved) intersection, Cartrette couldn't really tell which way Smith had gone. Cartrette stayed there a minute or two thinking what to do (next). Cartrette then went to nearby Evergreen (city). From there, Cartrette called Hayes on the phone, and told Hayes what happened. Hayes told Cartrette, Smith had radioed that he was on his way in. Hayes told Cartrette to (also) just come on in to the office.

Hayes confirmed that on February 28, there was a radio call from Smith. Though Hayes placed it somewhere between 9 and 9:30 a.m., he elsewhere indicated it was closer to 9 a.m. (E.g., on cross-examination Hayes placed Smith's 20-minute later arrival at Hayes' office also somewhere between 9 and 9:30 a.m. Hayes recounts Smith arrived in Hayes' office 15, 20 minutes at most after Smith's call to Hayes. Hayes' estimate was based on where Smith was located, which Hayes asserts he later viewed, below, and assumption that Smith had called Hayes roughly soon after he left his work place.) Hayes does not have a radio in his office but there is one that is located in an adjoining office. Hayes recalled that one of the ladies in the office stuck her head in and said that Smith was trying to reach Hayes on the radio. Hayes hadn't seen Smith earlier that day; nor had Hayes received any (earlier) phone calls from Smith indicating Smith was going to be late to work.

Hayes went to the radio office where he received Smith's message. Hayes called Smith back. Hayes definitively recalled Smith said, "I'm on the way in, could I talk with you?" Hayes replied, "Yes, I'll be in the office." Hayes didn't inquire (from Smith) what was going on. Hayes confirmed that at the time he could tell Smith was excited; and, that from the tone of Smith's voice and words it was not a normal request. Hayes testified credibly, Smith wasn't screaming, but Hayes could just tell and knew from the different tone of his voice on the radio that Smith was upset.

Hayes normally talks to employees in his office. In that regard (and any urging of counsel for the General Counsel to the contrary notwithstanding), I find that Hayes had reasonably first arranged with Smith for Smith's complaint to be discussed with Hayes in Hayes' office, as was a customary procedure for Hayes, though Hayes knew that Smith was excited and upset about something.

Though not sure of the timespan, Hayes guessed it was 5 minutes after Smith had called Hayes on the radio that Cartrette called Hayes. Thus, Hayes recalled as he got back to his office, Cartrette had called Hayes on the phone. Hayes relates Cartrette told Hayes Smith had left the worksite and Cartrette didn't know where he was headed, but (sic) could Hayes just see if Hayes could get Smith on the radio. Hayes has relatedly asserted a belief that the radios in Smith's and Cartrette's trucks were on two different systems; and, offered an explanation, Cartrette could not contact Smith directly by truck radio because of a system difference. (However, that would then appear inconsistent with Cartrette earlier relation of having received and answered a message that morning from Smith seeking directions to where the crew was working. In the absence of corroboration, I do not credit Hayes' explanation.) If Cartrette had heard Smith's traffic on the

radio, it would of course account for Cartrette's phone contact of Hayes. Several others surely heard it, below.

Be that as it may, in light of Hayes' recount of a Cartrette request at the time of Hayes to only try to raise Smith on the radio; and, in any event, in light of both Smith's and Hayes mutually consistent accounts of Smith's notice to Hayes that Smith was coming in, and *Hayes' approval of Smith's request to meet with Hayes as timely made* to Hayes, and of Hayes' confirming recount that he told Cartrette that *it was okay, that Smith had already called Hayes on the radio that Smith was coming in*; I am persuaded Smith's departure from the field even if not to be viewed as noticed to or approved by Cartrette at that time, was (at least) timely condoned by Hayes interim direct approval of Smith's request for the meeting of Smith with Hayes, whatever may have been Cartrette's developing view of the situation. I am also convinced, from an apparent time passage (below), Hayes had likely taken the time to obtain some preliminary report of the incident from Cartrette on the phone; and, then directed that he come in.

Norris recalled it was about 45 minutes to an hour after Norris arrived at work that Norris received a call on the radio from Smith, who asked Norris to get his foreman's permission to come back in. Norris related at first that he didn't say anything to Etheridge because Etheridge had heard it (the request) over the radio, and motioned for him to go. However, Norris clarified that he did ask Etheridge anyway; and, Etheridge told him to go.

Norris went to Hayes' office in Whiteville. Norris initially related he met Smith in the building, but then related on cross-examination that Smith had arrived first; that Norris had met him outside; and, that the two walked into Hayes' office together. Norris could tell by talking to Smith, that Smith was very upset; and, conceded that you could probably say mad. Norris recalled they proceeded over to District Manager Hayes' office, where they met alone with Hayes. Norris also recalled there was then no one in the hallway (leading to Hayes' office); and, when they went in, Norris closed the big wooden door to Hayes office. Norris' estimate was that Hayes' office is 45-50 feet from the front where the consumers come in and pay their bills. *Norris also relates that he didn't see any consumers up front at the time.*

As noted it appears there was some measure of time passage associated with the call of Cartrette. Hayes recalled it as but a minute or so later office manager Harlene Walters came into Hayes office and wanted to know if Hayes had heard Smith on the radio calling Norris to come into the office, followed by Hayes account of Norris and Smith separate arrival promptly thereafter. Hayes relates when Hayes responded he hadn't heard Smith's call for Norris, Walters said, "Well, he did and told Ricky (Norris) to come on into the office." Hayes recalled that as he started to the radio (room) to call Norris (and in notable contrast with Smith) *to find out upon whose approval* Norris was coming into the office, when at the door, Hayes saw Norris already coming down the hall.

According to Hayes' recollection, Norris had come in the back door (alone); and, the first thing Norris asked Hayes was, "What's going on?" Hayes replied, "I don't have the slightest idea. Come on in my office. Doug will be in a few minutes and we'll find out." Hayes relates he and Norris went to Hayes' office; and, as they sat down, and Hayes

started to ask Norris (about being there), in a matter of seconds, with Hayes' office door closed, Hayes heard someone come in the back door; and, Hayes heard the person coming down the hall *making a commotion*. From previous conversation on the radio and all, Hayes knew it should be about time for Smith (to arrive).

Hayes' account would have appeared the more readily persuasive, with the available and Employer presented supporting testimony of company witnesses, except Hayes has also then appeared to inconsistently recount that when outside his office, Hayes couldn't really understand what *they* were saying there; that *they* knocked on the door; and, Hayes told *them* come on in. If not Smith and Norris, as Smith and Norris appear (at least on occasion) to have claimed to have arrived at Hayes office together, it is then unclear who Hayes here has plurally referred to. On the other hand, Smith was unsure Norris was not already there as Hayes recalled.

Though accounts of Respondent's other witnesses appear not to be such to rule out Smith's and Norris' account of a meeting outside the building in which Hayes has his office, and a joint entry of Hayes' office as distinguished from Smith's prior separate arrival at the back of, and passage through a connected, separate warehouse building, on closer observance of the accounts of Employer's other witnesses, they appear in the main more supportive of Hayes claim of separate arrival of Norris and Smith; and, I find that to be the fact.

Employer's warehouse is a tin building, located adjacent to its office building, with covered walkway between them that joins otherwise separated buildings. Charles E. Ward is employed at the Whiteville District office as warehouse coordinator. Ward supports Hayes, at least to the extent of Ward's observance of Smith's separate arrival and entrance of the warehouse through the back door of the warehouse, and Smith's passage (alone) through warehouse and maintenance areas on his way to Hayes' office.

Thus Ward relates that he was in the warehouse the morning of February 28 performing his normal paperwork, when he heard a truck come up kind of rapidly outside, and a sound like wheels dragging on rocks. Ward had heard the traffic on the radio; and Ward knew that Smith was on his way in. Ward saw Smith come in through the back door of the warehouse and walk rapidly through warehouse and maintenance department. Ward did not see Norris in the warehouse. Though Ward observation corroborates Hayes (and Smith) in Smith's separate arrival (and parking in the back), Ward did not see Smith (or Norris) actually enter Hayes' office which is itself in the adjacent, separate building. At the time Ward saw Smith in the Warehouse, Ward confirms Smith looked real upset.

As Ward at that time was momentarily through with (certain) of his paperwork, Ward had started on up the hallway behind Smith. However, Smith moved rapidly ahead of Ward; and, Smith was out of vision (when) on his way to Hayes' office in the other building. Thus, Ward recounts Ward first went on to the lobby in the maintenance department where he had some paperwork to do, after which Ward (regularly) goes on to the office. When Ward (briefly) completed that work, Ward took his paperwork to the service representative's office up front in the adjacent office building, passing by Hayes' office. However by that time Smith

and Norris were clearly already in Hayes' office as is made to appear evident from Ward's own testimony (below).

BEMC employs Harlene Walters as office supervisor or manager in Whiteville district office. Walters has an office in the front office section, 10–12 feet from Hayes' office. Her desk or normal work area is approximately 12–14 feet from Hayes' office. Walters recalls she saw Smith when he came in. However, *she didn't hear Smith before he walked through the door*. Walters relates that it was after Smith came in the door that she had first heard his steps; and, that she just looked around to see who had come in the door and (observed) it was Smith. Walters did not say Smith slammed the door when he came in; nor, did she otherwise confirm Smith commotion with another at this time; nor did she specifically see when Norris arrived. Walters did not see them leave.

Thus, on the weight of what appears in the end to be the more persuasive evidence, I conclude and find it shown of record as more likely than not, that there was a separate arrival at Hayes' office that morning, first of Norris, and then Smith, as Hayes has otherwise recalled. To the extent Norris has had a conflicting recollection of an arrival on this occasion with Smith and a joint entry with Smith into Hayes' office, I conclude Norris is more likely simply in error in that respect; and as likely has mixed a recollection of another such occasion, for there were several. In any event, on weight of credited evidence I find that while there may have been no consumers present at the front when Norris first arrived, and he (and Hayes) had entered Hayes' office, it was more likely otherwise shortly thereafter when Smith arrived.

Smith acknowledged that he was very upset when he arrived. Indeed Smith testified he was on the verge of being emotional; and, that he could feel that something was going to take place. On entering Hayes' office, Smith first told Hayes that Smith was sick and tired of Floyd's treatment. Smith then said that *he wanted to go to the warehouse*. Smith recalls Hayes first told Smith to calm down; and, we can just talk here; but Smith replied, "No, Ronald, we need to go to the warehouse." Smith didn't think he was in Hayes' office for 30 seconds.

Hayes relates when Smith came into Hayes' office, that Smith had exploded with cursing, and vulgarities. Hayes doesn't like to use the words, but didn't object to it. At this time it was just generalities in that, Smith said, "This God damn Company is fucking us. They're not doing a thing for us. Floyd is a sonofabitch, et cetera, et cetera, et cetera." Hayes recalls, it was really incoherent in that Hayes could not really tell what Smith was getting at; that Smith jumped from one subject to another; there was no sense being made from it; and, Hayes couldn't get a word in edgewise. Hayes confirms otherwise that Hayes had said, "Doug, please calm down." Smith kept right on. Again, "Doug, please calm down." Right on. Hayes finally said, "Please, Doug, let's go to the warehouse so we can settle this." Smith then calmed down a little.

Hayes asserted main contention (sic, but in context seemingly objection) at that time was not to listen to Smith, but Hayes knew that they had other employees in the office. Hayes has also asserted he knew that they had members out in the lobby and his main contention (sic, again objection) was of those people having to listen to what was going on. On other occasion Hayes clearly reaffirmed his initial and

primary concern when Smith came in and all hell broke loose was to keep things quiet for the rest of the employees, and members out in the lobby. I am not persuaded Hayes knew there were members out in the lobby at this time, but he knew there were office employees in the area who might overhear a continued loud diatribe. (Certain testimony of Hayes, below, indicates Hayes did not know there were consumers present, in that subsequently he made inquiry of others whether there were any consumers up front that might have overheard the heated conversation in his office. There were.)

Hayes recalled Norris, to Smith's right, hadn't said a word at that point, but according to Hayes, Norris then did stand up and (also) say, "Doug, please calm down and let's go to the warehouse." Though initially asserting at that time Smith said, "Okay," Hayes promptly retracted with an apparent unsureness Smith said okay (or anything more). Hayes then related, anyway Smith turned around, opened the door and walked out; and, Norris and Hayes then followed immediately behind Smith. Hayes guessed they had stayed in his office for 3-5 minutes. (Office Supervisor Walters corroboratively estimated 4-5 minutes.)

In a voice described by Norris on cross-examination as an authoritative voice; and, then described as one of wanting to be heard, but not hollering or loud (and because of which assertions, Employer would question credibility of Norris generally), Norris related that Smith had started talking; and, that Hayes could see Smith was upset. Norris has recalled otherwise that when they arrived in the office, *Smith severally said, that he was "sick and tired of Floyd's shit," that he needed things to be moved; that Cartrette was not doing him right; and, that Cartrette had just jumped on him about the Union, and about another boy quit.* Contrary to Hayes, Norris corroborated Smith that Norris had *not* told or asked Smith to be quiet (in Hayes' office). However, Norris has confirmed Hayes that Hayes had asked Smith *several* times (to calm down); that they let Smith talk there; and, there was some profanity used.

Smith has acknowledged his voice was louder, but Smith has (essentially) questioned that he was screaming. In contrast with Norris' nonobservance of consumers up front when they went into Hayes' office, Smith has testified that he did not know whether consumers who were paying bills up front could hear all of this going on; but Smith (candidly) said his then concern was to go to the warehouse where they would not hear it. I am persuaded therefrom, Smith had (at least) entertained the consideration (if Smith was not actually aware of it at time of his later arrival), that there were consumers in the area at that time. However, though Smith from the outset repeatedly requested they go to the warehouse, Smith did not exit Hayes' office without first obtaining Hayes' agreement to go to the warehouse to continue what was already a very heated discussion by Smith. Indeed, Smith acknowledged it as a fair statement that at this time he was out of control; and Smith asserts (credibly) on that account he had wanted to get where consumers could not hear it. Though Smith didn't think it was 30 seconds between the time he went into Hayes' office and left and went in the warehouse, on weight of more credible evidence of the time passage, I find it was more like the Hayes' (corroborated) 3-5 minutes.

During this time, Norris confirmed, and I credit: that Hayes told Smith to calm down, repeatedly; that Smith said they didn't need to talk about it there, and several times, we need to go to the warehouse; that Hayes at first said, no, we can do it here; that finally, Hayes agreed to go to the warehouse; and, when he said, "Let's go," Smith walked out the door; and, they behind him. Thus, I further credit Smith and Norris that Smith was urging on Hayes from the outset that they go to the warehouse to hold what Smith already knew was on Smith's part to be a heated discussion; and, I find that when after a few minutes Hayes saw he could not quiet the really upset Smith, Hayes agreed to go to the warehouse to continue the discussion there where it would not be heard by others, i.e., by office employees, or any consumers that might be up front.

In the interim, Office Supervisor Walters had heard a loud outburst coming from Smith. She heard a lot of profanity and vulgar language, that she said (without press of either party) she would rather not repeat, stating she had religious objection to repeating it. Walters did not hear Hayes use profanity in any way. Walters then related she couldn't recall in the course of her 16 years people had ever used profanity before; and, Smith's use of profanity was the first time she had heard it in the office.

Counsel for General Counsel contends that in a business where supervisors have acknowledged that profanity in employee conversation was not unusual, Walters' assertion that she hadn't heard it in her 16 years in the office, is simply not worthy of belief. Apart from the loud and profane Smith incident in the office under present consideration, and as distinguished from similar employee discussions with supervisors in the warehouse, or in other plant or work areas, there is no evidence presented to support there was prior use of such profanity in office areas by employees. While Hayes doesn't appear to make claim that profanity was never used in his (well insulated) office, e.g., when used in discussion of prior employee complaints and grievances, what was different here (I find) was clearly the degree of loudness of the conversation held inside Hayes' office, and a circumstance that certain of Smith's profane vernacular extended in varying degree outside the room, with undesired effect.

Contrary to contention of General Counsel, I credit Walters recollection that employee use of such profanity in the presence of office employees working in Employer's general office areas was (as I am convinced and find it was, at least) very rare. However I also conclude it was rare, in part because the instance of it emanating from Hayes' office in prior discussion of employee grievances, etc., was equally rare, because of Hayes' well insulated office.

Walters has otherwise related that she then went up to the front to check on the employees, because everything was so loud in the building, until it was a *terrifying* experience. No one else has confirmed or described this incident in terms of it being a terrifying experience, so much as describing it as an unusually loud conversation then being held in Hayes' office, and, in certain overheard profane aspects, offensive, as determined below. Walters otherwise recalls that she went up front and walked in where the other ladies were, and they were like, what in the world is going on, because they did not know what or who it was. Walters has then more revealingly related she just said (as in full explanation to them of the situation), "Well, it's Doug."

Walters' late reference to a terrifying experience when initially made at hearing impressed me at the time as not only being clearly conclusionary on her part, but as more probably a subjective hyperbolic summary being made under the circumstances then being described at hearing. On present review of the entire record in that regard, and all other witnesses' accounts of *this* incident, it is even more apparent as in nature an exaggerated overstatement. Employer's seizure in brief on Walters terrifying remark in the above circumstances does not advance it in my view in degree of persuasiveness of what the facts of the developing incident actually were. This is not to say the conversation was not *unusually loud* in being heard outside Hayes' office despite insulation there (as compared with the rest of the office areas), and *clearly offensive to some*, both because of that loudness and the overheard profanity being used by Smith, who had been clearly authorized by Hayes to state his complaint there, but was as clearly out of control in doing it.

Hayes' office is 12-by-16 feet with well insulated walls, 6 inches of insulation overhead and with solid core wood doors. Hayes version is that Smith's voice was very high pitched, angry, abusive and very loud. Hayes stated at hearing he thought that everyone heard what was going on. However, in doing so, Hayes acknowledged that was at the time being concluded by him from his having just heard the prior testimony of others at hearing.

In significant contrast, Office Supervisor Walters related that she had heard no specific subject matter, and acknowledged that it was fair to say that she had no idea what the subject was that was being discussed in Hayes' office. Walters related further, the only person's name she had heard called outside the *two* parties talking (Smith and Hayes) was Cartrette. Though Walters has confirmed Hayes said to Smith, "Let's go to the other building," indicating the degree of matched loudness in Hayes' voice as well, Walters has not denied Smith had been urging that action upon Hayes even earlier.

General Counsel's witness Holden recalled the incident when Smith was in Hayes' office in February. Hayes' office is located at the end of the hall; and, Holden's office is located *directly across* from Hayes' office. Holden confirms there was a lot of pretty loud talk; and she could hear Hayes talking to Smith, and Smith talking back, but Holden (also) could not tell what was said. Although Holden acknowledged it was a pretty heated scene; and that she did hear a lot of shouting, including some profanity from Smith, she could not say Hayes was telling Smith to calm down, nor tell what Smith had said about Cantrell (sic, Cartrette), as all she heard was some loud voices and a lot of loud talk. Holden credibly acknowledged and explained that at the time he really didn't want to hear the conversation, as it was pretty loud.

Ward recounts that he went on up to the office, to the service representatives and gave them his paperwork. In doing so Ward went down the hallway and made a right to go by Hayes' office, then on up to the service representatives. Ward estimated it as probably 30 feet to Hayes' office, and, 60 feet all the way up to the front. As Ward passed by Hayes' office, Ward heard loud noises, which he described as an awful lot of strong discussion going on, and people upset. In passing Hayes' office Ward heard *Smith say that he just couldn't take it any longer out there under the present conditions that he was working. Ward heard some*

*profanity, involving God's name being taken in vain* which Ward stated also (without press of party) that he'd rather not repeat.

Office Supervisor Walters recalled that outside of the (office) employees, there were two consumers in the building at this time, one of whom she knew, and one who was a new consumer member. Walters recalled one of the service representatives had talked to the two consumers and reassured them, though Walters did not hear the conversation. Ward relates that when he went on up to the front, and gave his paperwork to Souls, the service representative, there was a member in her office that was real upset (over) what was being said in the office. At the time up at the front lobby, Ward could hear both Smith and Hayes. *Ward heard Hayes asking Smith to calm down and let's talk about it*, confirming Hayes was also loud, from time to time.

Ward relates they told the member they had an irate member in (which Ward concedes he even then knew was not the fact), and they did so because they really didn't want to relay on to them (sic) that it was their employees that were out of hand. After Ward gave his paperwork in, they walked out the door seemingly satisfied, Ward then proceeded back by Hayes' office to maintenance department where Ward had some more paperwork to do. As Ward went back (again) by Hayes' office Ward relates Smith appeared to be still upset over the situation.

(3) The heated discussion as continued in Herring's warehouse office

Smith, with Hayes and Norris following, went directly to Herring's office in the warehouse, where they further conversed there alone with door closed. Hayes account is that when they entered the warehouse, they went into Herring's office, which is the first office on the left on entry. Herring wasn't in the office. Smith was the first to enter the office. It was either Norris or Hayes who shut the door. Hayes went around to Herring's desk (a steel desk with a wood veneer top), and sat down. Smith did not sit down.

Hayes account is that Smith (again) exploded, just cursing and carrying on, talking about the co-op, talking about Floyd, but (still) very incoherent. Hayes recalled *Smith was saying that the co-op was just trying to screw everybody, all it's employees; that Floyd was a g— d— s.o.b. and nobody could work for him, etc*; and, that Smith continued on for a few minutes. On another occasion, Hayes related that after a minute, or less, Smith had picked up with both hands a big commercial-type, real heavy, approximately 8-inch glass ashtray that was sitting in the corner of Herring's desk; and, Smith (then) brought it down on the desk so hard that Hayes was scared it would shatter; and, that Hayes looked for glass to come flying all over him, but it did not.

Smith admitted that during this conversation he had grabbed a big yellow ashtray on Herring's desk; had picked it up in both hands and brought it down (but not from behind his head), and asserts he stopped himself. Smith conceded that it made a louder sound than laying it down; and, that if he had slammed it, it would have shattered. However, Smith didn't; and, Smith has testified that Hayes had no reason to be scared of him. Smith also denied his problem was a violent temper. Rather Smith asserts his problem at that time was when a grown man is harassed by a company, has an emotional problem; and wants to sit down and cry. Smith

has testified in that very respect, he had an emotional breakdown right there; and, he began crying, which is something Smith states he rarely does.

Norris has confirmed Smith picked up the ashtray in two hands; and, that Smith brought it down *without* slamming it. Norris testified he didn't think Smith was going to slam it; nor did he worry it would shatter. Norris also confirmed Smith had tears in his eyes; just broke down; forgot himself; and was just about to cry.

Hayes admits there was no damage done to the ashtray or the desk, but then related there was a very distinct loud noise. Supervisor Coleman recalled that on February 28, Coleman was standing inside the warehouse at the map room at Whiteville. The map room is about two steps, i.e., 6 or 7 feet from Herring's office, where Hayes, Smith and Norris were. When they first went in, Coleman confirms he heard a loud noise, which he described as being just like a loud bang, like something had hit a table or something. Though initially relating it didn't really alarm him, on being returned to the subject, Coleman then said he felt really nervous because he knew Smith was mad.

Admitting he was louder than normal, Smith told Hayes, "I'm tired of this. I've been to you. You don't do nothing. You have to move now. I just can't stand it no more. You can't control your man." *Smith said, he (Hayes) had let Cartrette harass Smith, and keep right on. Hayes knew what was going on; and he just couldn't work with Cartrette any longer.* Hayes needed to put Smith on another crew; and, that would solve a lot of problems there. *Smith otherwise admitted he used some profanity*, though Smith didn't recall it beyond on cross-examination recalling he said, *he was sick and g\_\_ d\_\_ tired of it.* However, Smith categorically denied that Hayes said they needed to go to the warehouse, testifying (convincingly) he was trying to get Hayes to go there.

Norris initially recalled Smith said *he was tired of Floyd's shit*, but had (said) nothing worse than that. But Norris later acknowledged that Norris had previously said (in prior affidavit) *Smith had said he was sick and damn tired of this shit.* Though then saying Smith didn't say anything else like that, Norris again generally acceded Smith had used some cuss words that Norris couldn't describe (sic, recall).

Norris however, has denied that Smith lost control again (or a second time in Herring's office). Rather, Norris relates Smith spoke authoritatively and told Hayes his problems. Norris corroborated (but only generally this time), *Smith got back telling Hayes what Floyd had done.* Hayes let Smith talk; and, *Smith said that he needed, or he wanted to be moved on the line crew.* Norris has candidly affirmed Hayes did very well at listening to them, which was the best thing to do; and, Smith (eventually) calmed down.

Coleman recalled he heard Smith yelling, and cussing in Herring's office. What Coleman heard Smith say was, "I can't work with that son of a bitch (referring to Cartrette) no more." Coleman heard Norris trying to calm Smith down; and, Hayes say, "Well, Doug, what is the problem?" Then it quieted down a little bit, and Coleman (notably) heard Smith say, "Ronald, if you will just take me off of that crew, I'll work with the line crew or anything, just to keep from having to work with Floyd." Coleman later reaffirmed he heard Smith, when calmed down say, "Ronald, if you'll just take me off of Floyd's crew, (he) said I'll work with the line crew or do anything you ask me to do."

Coleman has worked with BEMC for quite a while, and, on cross-examination *Coleman acknowledged that the men use rough talk at times; and, that it was not uncommon.* Coleman personally doesn't cuss men out; though he has used a damn or something like that before. Coleman thinks nothing of it if a man in a conversation uses profanity with him; and also, if he hears someone else using profanity in another conversation, it doesn't really bother him a whole lot. *Coleman testified the only time Coleman gets offended by profanity is if it is directed toward him.* Coleman has never used profanity towards, or cursed his immediate supervisor. *Coleman also confirmed if the cursing is in a tone of voice that offended the supervisor, it is a violation of the work rules.*

Though Norris (and Smith) didn't see Cartrette when they went into the warehouse, I find he arrived there shortly thereafter. Cartrette relates (with corroboration of Ward) that he was in the warehouse, first in the breakroom (where he heard nothing), and then in the warehouse lobby. (The breakroom is about 40 feet away.) However, at best, what (if anything) Cartrette acknowledges he heard when he went to the lobby adds nothing to this incident's account.

More notably, when back in the warehouse doing paperwork, Ward observed Hayes, Smith, and Norris all come into the maintenance department and go into Herring's office. Ward heard the same (as Ward has described it) old upset over present working conditions between Smith and Cartrette; and, statement *Smith would not go outside and work with Cartrette anymore.* Ward stayed where he was for a few minutes until he heard a loud sound, like, you know, a desk or something had been hit, that upset Ward. Ward asserts that at that time Ward told Cartrette that he (Ward) didn't want to listen to it anymore. Ward went on back to his own office. *Ward stated it made him real upset that it had got down to the point where people were getting abusive to company facilities, just because we were upset and couldn't work things out.* Ward's and Cartrette's accounts are not wholly compatible.

It is reasonably clear of record and from the above, and I preliminarily conclude and find that in registering his complaint about Cartrette with Hayes, Smith did make some profane and vulgar statements of the order: (a) in Hayes' office, that this "g\_\_ d\_\_ Company is f\_\_ us; Cartrette is a sonofabitch; and, I'm sick and tired of Floyd's (Cartrette's) shit, or, sick and g d tired of it (Cartrette's shit)"; and, all of which remarks were likely substantially overheard by certain office employees and/or consumer members; and, (b) in Herring's warehouse office, that Hayes knew what the "damn" problem was (below); that Smith was "sick and tired of Cartrette's shit, and/or sick and g\_\_ d\_\_ tired of this shit"; the co-op was just trying to "screw" everybody, or all its employees; that Cartrette was "a g d s.o.b.," and nobody could work for him; that Smith couldn't work with that "son of a bitch" no more; and, all of which remarks were not heard by any office employees, or consumer members. I further conclude and find it is reasonably apparent from the record that Hayes was not personally offended by Smith's cursing in the warehouse, or his office.

Hayes recalled the first question Hayes asked Smith in the warehouse was, "Doug, tell me, what is the problem?" Hayes recalled very distinctly, Smith said, "You know what the damn problem is." Hayes describes (only generally)



Smith went back into the routine about Cartrette and the co-op. I credit Smith's (essentially) corroborated account of what he said about Cartrette continuing to harass him, and, of Cartrette only just recently getting on Smith about the Union and a Stevens quit, which is not explicitly denied by Hayes.

Hayes has recalled that he otherwise said, "Doug, please write me up a grievance on this. I cannot follow through with it. I cannot investigate it without a formal grievance." Hayes has related Smith refused to write Hayes a grievance at that time. Rather, Hayes recalls Smith told Hayes that Smith needed to go home for the day, because he was emotionally upset; and Smith felt he could not continue the day. Hayes told Smith he could go home for the rest of that day (only). Hayes recalled initially that Smith had said, I'm no good to the Company or myself the way I'm feeling right now and the situation I'm in; and, I need the rest of the day off. Hayes subsequently corrected with recollection it was Wednesday, and Smith had initially asked for 2 days off; and, that Smith had also said, "I need to go see a doctor."

In contrast, Smith testified he didn't say he was going to see a doctor. Rather, Smith then felt like, and Smith said at that time that he may need to see a therapist; but he made it clear he was not leaving that day for that. That was not his intent in leaving. (Smith did not subsequently see a doctor, or therapist.) Apart from Norris' corroboration that Hayes gave Smith the rest of the day off, Norris' (non)recollection on days off discussion is not helpful.

Hayes has more fully explained the grant of only 1 day off, and in doing so has effectively confirmed that Smith did not say he was going to the doctor. Thus Hayes has related he knew from a monthly printout that Smith was low on "unauthorized sick leave." In that regard, Employer has three types of leave: vacation, which has to be scheduled; sick leave, for which you're required to bring a doctor's slip back; and, 5 days of unauthorized sick leave, which is used if the employee gets a headache, etc., and doesn't really need to go to a doctor but needs a day off. The employee can use the unauthorized sick leave anytime, any place, with no questions.

Thus on its face inconsistent to the extent Hayes has ascribed to Smith a statement of going to see a doctor, Hayes related Smith at this time was asking for unauthorized sick leave and on checking, Hayes determined that Smith did not have enough to take the 2 days off. I am wholly convinced therefrom Smith had not asked for a day off to go to a doctor, but rather the reference to a doctor was as Smith has related it, namely, only an aside comment that he might have to go see a therapist, and with Hayes recognizing Smith's present request for the 2 days off as actually involving a request for 2 days of unauthorized sick leave. However, I credit Hayes that Smith only had enough unauthorized sick leave to take that Wednesday off. Hayes on that account granted the rest of that day off only.

Hayes has initially asserted he emphasized that he would love to have a grievance from Smith. Hayes later clarified what Hayes asked was for Smith to file a grievance against Cartrette, if Smith had problems with Cartrette, so Hayes could investigate it, and follow up on it.

On cross-examination, Hayes testified Employer's grievance procedure works up and down. A supervisor can file a grievance against an employee, and vice versa. Other Hayes

testimony more accurately shows Hayes' spoke of BEMC policy that provides for a supervisor's discipline of an employee (down), and an employee's grievance of a supervisor's action (up). Thus Hayes states when a supervisor disciplines an employee he has to follow the policy manual, as does an employee in filing a grievance as part of the (same) manual. Hayes states it was Smith's responsibility to file a grievance against his supervisor.

In regard to grievance discussion in Herring's office, I credit Norris' recollection that Norris had also spoken to Hayes about Cartrette. Norris told Hayes that he knew how Cartrette was. Norris relates other fellows had trouble with Cartrette in the past; and, it wasn't (just) that Cartrette expects a lot from his men. Though Norris didn't know Cartrette's problem as he never had worked with him, Norris had discussed Cartrette with other employees that have worked with him; and, Norris told Hayes that Norris knew for (his concluded) fact Cartrette was hard to get along with. Norris discussed that with Hayes. Then they broke up. Norris relates Smith went home; and, Norris went back to work. Norris estimated that they were in Herring's office for 10-15 minutes.

Hayes has not denied that in the warehouse Smith was nearly tearful and simply broke down. I am wholly persuaded that at this time Smith was so upset at least by his perception of Cartrette's getting verbally on him in continued unwarranted harassment of Smith on the job, including his (determined) recent harassing statements on clearly protected matters, to the point that Smith's frustration thereover resulted in the show of unplanned tears. In that regard, company witness Stevens has confirmed that on the day Smith went tearing in, Smith had come back to Stevens, and Smith said he (Smith) had showed his tail. (Leavitt has corroboratively defined show your tail as a colloquialism that generally depicts an adverse situation, i.e., someone did something they didn't particularly want to do.)

After Smith left, Hayes asserts he first discussed a (contested) damaged door with Ward, below. Hayes next talked with seven office employees, secretaries, service representatives, cashier, etc., visiting each of their individual offices. Hayes asked them if they had overheard the conversation that went on in the office probably 30 minutes prior. After they responded (I infer) that they had, Hayes apologized to all of them on behalf of the co-op and himself for the language used that morning; and, Hayes also told them that he would try to see that something like this did not happen again in the future.

During a (later) conversation with Harlene Walters, Hayes asked Walters *if there were "people" (members paying bills, transacting business) in the office at the time*. As a result of Walters' response, Hayes called two members that were in the front office. Hayes asked them the same questions; and then Hayes apologized to them for what had gone on. The members did not testify; and, General Counsel has established Hayes did not subsequently write the members a confirming letter. Nonetheless, I credit Hayes that he made the inquiries, and the calls that he has said he did.

Though initially indicating it was after the meeting with Smith that Hayes spoke to Cartrette, Hayes clarified that it was after Hayes had finished in the office, that Hayes went back to the warehouse and spoke with Cartrette who was then (back) sitting in the breakroom. Hayes then discussed

the situation with Cartrette, and found out what happened. Cartrette told Hayes Smith had come to work late that morning; that Cartrette was under the impression that they were having union negotiations that day, and that Smith would not be there; but that at somewhere around 8:30, 9 a.m. Smith had showed up for work.

Hayes recounts more definitively that Cartrette told Hayes: *that he had to discuss Smith's work performance with Smith that morning; that Smith had not been trimming around the Poles, guy wires, telephone pedestals; and, Smith had not been doing his job in the last few weeks, or months, but (notably) with Hayes immediately correcting, he didn't believe that Cartrette had said how long; that Cartrette had carried Smith around a fence to put him to work and he'd decided that now would be the time to discuss with Smith the situation of Smith not trimming around poles and not doing his job correctly; that he had no more than got the words out of his mouth, than Smith exploded on him; that Smith said Cartrette was treating Smith dirty and doing him wrong, etc.; that (Cartrette said) Smith had just erupted into problems (sic); Smith had lost it, and went to cursing Cartrette; and that Smith had wheeled around and left.*

Hayes also recalled Cartrette said that at some point Smith had cursed Cartrette, and (as noted, unsurely) had called Cartrette something like m\_\_ f\_\_, or something to that effect. (Hayes promptly stated, now, again, I'm not sure of that statement; and, I was not there.) Hayes continued, Cartrette said Smith whirled around in the truck and took off; that Cartrette had no idea of where Smith had gone, or which way he was headed; and, at Evergreen (City), Cartrette called Hayes and learned where Smith was headed.

#### (4) The issue of the alleged damaged door

As earlier noted Smith responsibility for truck damage and repair was not sustained. In first going to the office (i.e., after Smith passed through the warehouse on his way to Hayes' office), Ward recounts he noticed the back door appeared to be damaged, because it wouldn't close properly like it is supposed to. Ward relates: it wouldn't go completely to; it was like it was jammed; like the door had been pulled open real rapidly; and it went back up against the bricks. Ward asserts the door was bent from the top to the bottom; and, Ward asserts the door had been working properly *before Smith went through it.*

On cross-examination Ward explained under his category (classification) it is Ward's responsibility to check the co-operative's doors, since, under his classification, Ward *could be* responsible for just about any part of the maintenance of the building. Ward acknowledged he doesn't make any records. If something needs to be repaired, they have a maintenance person that he tells if there is anything that needs to be done; and then they follow through with it. In any event, Ward asserts, it is like steps that he follows each morning. *Ward asserts he makes his maintenance check of the doors he goes through in the morning as Ward completes his paperwork.*

Thus Ward relates he noticed the door was sprung; and, the main reason (he noticed it) is, that is one door Ward makes sure is locked and secured of the afternoon. Ward later added that's basically one of his responsibilities, to make sure the doors of the warehouse and offices are secured. By the door being "sprung," he means the door had

a stopper; the door would go to a point, and, then it would just bump; and it would be spaced out where it can't go all the way to be locked. Ward relates that he had kind of picked up on the door, thinking maybe he could do something with it then, but at that time couldn't.

In contrast, Smith didn't recall slamming the door open on arrival, but admitted that *on leaving* the building in which Hayes has his office (going to Herring's office in the warehouse), Smith had slammed the back door, but Smith didn't know about busting it, warping it, or knocking paint off of it. (Ward's account of damage to the door notably would place the damage as occurring well before Smith's exit of the building in which Hayes has his office, i.e., it was noticed by Ward *before* he entered the office building and heard Smith and Hayes talking in Hayes' office.)

Hayes unequivocally confirms Smith as to when Smith had slammed the door. Thus Hayes recounts that Smith walked on down the hall, took the left to go out the back door. Hayes confirms that the back door is a heavy metal steel door (adding) with a recloser on it that supposedly keeps it from going too far open and closes it back on it's own. Hayes recalled when Smith slammed that door open, Hayes was approximately four to five steps behind Smith. Indeed, Hayes asserts that he had heard it when it jammed against the brick wall. Hayes also explained the door is inset about 8 inches; and when you open it so far, then it hits the corner of a red brick wall.

Norris (I find on or after March 5) asked Hayes for what reasons was Smith suspended and Norris was given several, namely: for insubordination; damaging company property; and coming into work late. Norris asked what property did Smith damage. Hayes said, you saw him slam the door. Norris said he didn't. Norris went back and found no damage.

Hayes acknowledged there was no visible damage to the door at that time that he saw, and he was right behind Smith in walking out, though Hayes also said he did not turn around and look at the door. Hayes did recognize that the door had been slammed hard against the brick; and, he thought about it. After Smith left (the warehouse), Hayes went back to his office. When Hayes walked up to the door to go back in, the first thing Hayes did was check the door; and, he saw it was not closed good. The door had come up against a jam and there was a little crack in between. Hayes checked the door (further); and, Hayes looked down the side of the door where it had hit the brick. There was a crease down it from the top to the bottom, with brick dust on it.

Smith does not recall the door banging against the brick so hard that the brick bent the door. Smith did look at the door later. Smith's understanding also was that Hayes told Norris of the damage, and Norris investigated it; and, people told Norris that the door was already tore up. Smith didn't believe he hit the brick with the door; and, he categorically denies that he tore it up.

Norris confirms that when Smith left Hayes' office, Smith went through Hayes' door, and a back door; that the back door is a big metal door; and that Norris heard a boom, which he described was just like a hard close. Norris otherwise supports Smith as he has related that he didn't hear the door slammed and hit brick, rather, he (only) heard it closed hard. Norris also confirmed that he inspected the door carefully, but not until 3 or 4 days later, after learning of it from Hayes (as reason 4 stated by Employer for Smith's suspen-

sion, above). Norris observed there was no damage to the door then.

Holden testified she heard the door slam that morning, at approximately 10 a.m. (not twice). Holden went to lunch that day at noon. She left by the door someone would use to leave Hayes' office to get to the warehouse. Thus, shortly after noon, Holden had occasion to look at the back door. Holden explained that her reason for doing so was that earlier she heard Ward say that Smith had broken the back door. Though she did not see Ward at the time, and she didn't know who Ward was addressing, Holden testified firmly that Ward was in the hall; and, that Ward had said Doug Smith broke the door.

Holden explained, in their office there is no insulation in the attic, or above the offices; and, if you make a statement in one office you can hear it all over the office. Holden testified that she knew that Ward had come up through the office from the warehouse for some purpose, when she heard it. So, being a curious person, when she went out the (back) door to go to her car to go to lunch she had looked at the door to see what had happened. Holden saw no recent damage to the door, below.

Ward has denied making the statement that Doug broke the door, and without seeming reference to any Hayes direction to him that a repair be made. Hayes in contrast recalled that it was after Smith left and Hayes went back to his office that *Hayes asked Ward to check the door*, confirming it was about 10 to 10:30 a.m. However, Hayes stated (unsurely), he believed he called Ward on the intercom, or, he may have went back to the warehouse, then stating (even less convincingly) he didn't remember exactly the *correct* way he did do it. In any event, Hayes is clear he did ask Ward to check the door, after Hayes' return to the office when he had noticed that the door wouldn't close good.

In contrast with Ward's earlier observance of damage to the door (i.e., after Ward followed Smith through the back door), Hayes' asserts Ward didn't tell Hayes anything when Hayes asked Ward to check the door; and, to try to get it to where it would at least close. On other occasion, Hayes recollection was Ward did not mention it (neither Ward's claimed prior observation; or earlier attempted repair; or, a Holden attributed Ward statement that Smith broke the door) to Hayes, though Hayes hedges, things were a little hectic at that time.

Hayes was also not sure whether Ward made the repair or whether the fellow that works with Ward did. Hayes didn't know what happened on the repair of the door after that, because Hayes didn't talk with Ward about that anymore. Once Hayes told Ward about the door, it was Ward's responsibility. Walters did not testify in regard to the door, beyond that earlier noted that she did not say that Smith had slammed the door on entry.

To Holden's knowledge Ward had not made any repairs to the door between 10:06 a.m. and 12 noon; and Holden testified that she wouldn't think that Ward could have made repairs and she wouldn't have known it; if Smith had broken a steel door. Holden also thought if somebody had worked on the door, they would have known that they were there. Indeed, Holden was categorical, that if the door was repaired between 10 a.m. and 12 noon they certainly would have heard something there, asserting, you can hear everything in the office, including a normal conversation. Holden stated

that in fact, Hayes and she know that if they talk very loud you can hear them *on the telephone*.

Ward subsequently recounted that he repaired the door two different times that day. When he first observed that the door was going (closing only) to a point and stopping, and wouldn't go on through, Ward asserts he tried to repair it, but Ward was then unsuccessful. Ward described the door as a 4-year old very, very heavy steel exterior metal door. Ward relates that it was probably about 10:30 a.m. that day, Ward went back and tried to repair it again; and, Ward asserts (basically), that Ward (again) just grabbed hold of both knobs on both sides and picked up, just a minor adjustment. Ward assertion of repair is compatible with Holden's account in the sense of effecting a noiseless and simple adjustment, and in asserting that in making the repair he didn't take any tools and beat on it. However, Ward then related, the door will now close to the point where you can lock it, but it still won't close like it ought to; and that conflicts with Norris account. Ward asserts he didn't completely repair it; and, the door is noticeably different than it was before; and, that (other than dents from the bottom to the top of the door), there is now a rust streak from top to bottom.

Holden had earlier testified when Holden opened the door at lunchtime, she looked at the door and she saw no (recent) damage to the door. The only thing that she saw was an area where paint had chipped off. Holden then rubbed it; and, the paint was rusty. Cross-examination revealed Holden didn't discuss the damaged door with Smith at all; nor remember any prior discussion of it with the Union, neither Ruff nor Hatcher. Holden's first mention of it was the very day of the hearing with the General Counsel. (The door incident was apparently not a subject covered in Holden's prior affidavits). Though acknowledging that it does not appear in her prior affidavit, and that she did not get down on her hands and knees and inspect the door, Holden has testified no less firmly:

but I opened the door and I looked at the door. There were no bricks broken. There were no hinges broken. The only thing I saw, as I testified, was that there was some paint popped off of the door and I did rub it and my hand was rusty. I know that paint pops off of a door and it wouldn't be rusty if it had just popped off the door.

Ward's account of his own initial observance of Smith's damage to the door following Smith's entry of the office building is simply at major variance with (any) of the accounts of Smith, Norris, and Hayes who place the door slam and/or hard close later as Smith left the office building on his way to the warehouse. Nor is Ward's account of earlier Smith damage to the door on Smith's entry corroborated by office supervisor Walters (or Holden) who was in position to do so, if it had happened the way Ward has recalled it. I do not credit Ward recollection or description of Smith causing damage to the door on entry.

In contrast, Holden's testimony on the door, despite apparent noncoverage in her affidavit, was firm, remained internally consistent on extensive cross-examination; and, in her description had the ring of truth to it. In short, I do not believe that Holden has made this testimony up out of whole cloth.

Thus, I am convinced that on return to the office building Hayes did then notice the back door which Smith, in passing through had slammed open, was not closing completely, and in telling Ward to fix it so it would, probably told Ward that Smith had slammed the door; but that since Ward had already noticed that condition earlier, he has thus ascribed it to Smith on entry; that, in any event, Ward's earlier observance of the door jam simply decries Smith's later causation of it on leaving; there is no convincing evidence that Smith did any damage to the door on entry; in any event, that Ward did say to someone in the corridor that Smith had broken the door, which Holden overheard; that upon Holden's inquisitive view of the damaged door at noon time, Holden found no visible recent damage; that in the interim the jam, such as it was, was cured by Ward's very minor adjustment; that Ward did not communicate with Hayes again about the effected repair, probably on that account; and, that Hayes, to the extent he has ascribed door jam damage to Smith, on the basis of Employer's own witnesses' testimony, Hayes is (at best) in error, and at worst is shown to have used that door jam condition in a discriminatorily opportunistic manner; and to the extent they have sought to ascribe brick-caused rusty door dent damage to Smith, that assertion is simply shown demonstrably false by all the credited evidence.

(5) Other material events before suspension of Smith  
on March 5

Smith relates on the next day, Thursday March 1, he came in, and Hayes told him to go home, and rest; and Hayes would see him back Monday. Hayes confirms he had another conversation with Smith then. Hayes asserts he did not feel confident with his investigation at that time. Hayes did not feel like he had done a thorough enough job to make a decision on the issue. So, when Smith came in, Hayes met Smith at 6 a.m. Hayes asserts he granted Smith that day off (which was the rest of the week for Smith), with pay, because Hayes did want to do a thorough investigation and find out what had happened.

Smith did not recall anything said about an investigation. I credit Smith that there was nothing said about a further Hayes' investigation at that time; though I conclude it is very likely Smith would have suspected as much. As Friday, March 2 was a regular day off for Smith, Smith returned to work on the following Monday, March 5. Smith was then suspended for a 40-hour period.

Hayes testified neither Hayes or Cartrette has authority to fire Smith. Cartrette does have authority to write Smith up, but would usually make that decision with Hayes. Cartrette would check with Hayes, and, they would discuss it. Hayes asserts that it would be Cartrette's decision to make, as he is the foreman of that crew. In contrast, Hayes relates that in the interim Hayes was doing ore investigation. Hayes had another discussion with Cartrette.

Hayes relates it was really basically the same thing Hayes had just described only *it went into more detail about what led up to it as far as the trimming around poles and the report Smith was sleeping on the job.* Indeed, Hayes recounts that *they went out in Hayes' car and looked at an area that they had cut just a day or two prior to that. They observed poles with the stuff still standing around it. There were some telephone pedestals and guy wires that hadn't been tried*

*around. Hayes relates, you could follow down the road and see that it had not been done correctly behind the machine.*

Hayes asserts that after Hayes discussed it with Cartrette, Hayes went to Stevens, who is the heavy equipment operator on the Kershaw, and whom Smith was actually (working) with, to see if Stevens had witnessed what had happened between Smith and Cartrette that morning. Stevens had not. Stevens said he was on his piece of equipment working a distance down from them. The machine was making a lot of noise and Stevens did not overhear any of it. Hayes talked with Ward, the warehousemen, about Smith coming through the office, and the truck sliding up in the pole yard, etc.

Hayes relates that later, on Friday afternoon, after Hayes had gathered all of his facts together, Hayes called Shallotte, thinking he spoke to Batten, but that it could have been Dimery, and informed them of what had happened. (I have no doubt Hayes spoke to Batten, and probably Dimery as well.) Hayes got counsel's number; and Hayes spoke with counsel to make sure that he was legal on what he was going to do.

(6) The warning discrepancies

Cartrette acknowledged he didn't say nothing (sic) to Smith about failing to report to work on time without explanation, because Cartrette was under the impression that Smith wouldn't be at work, because Smith had told Cartrette a week before that he wouldn't report to work that morning. Cartrette was present when the above warning was read to Smith. Cartrette first asserted (simply incredibly) he didn't remember that one of the things that Smith was warned about was for his failing to report to work on time without explanation. When shown the document, and 4, Cartrette's answer then was, they wrote this, and Hayes read it to Smith; and Cartrette didn't read it or whatever. When Cartrette acknowledged that he did initial it, he then asserted that he did so (only) because he was in there on the meeting. I conclude and find Cartrette did not initiate or prepare the suspension and warning, or its reasons. I further conclude and find that Cartrette could not explain BEMC's reason 4 for suspending Smith, and, with good reason.

Hayes acknowledged that Smith was not scheduled to work on February 28 at all that day. Hayes then sought to explain a use of this stated grounds for the discipline, on basis if anyone is scheduled not to work, employer schedules work load around that. It had been scheduled around Smith. No one was looking for him to come in. They have had situations similar to this, e.g., where an employee, after he has asked for a day off, finds out that he doesn't really need it off, he just needs a couple of hours, or maybe 4 hours. BEMC policy has reservations for that. All the employee has to do is to telephone and say, "Can I come back in?," or, "I'm coming in." Hayes asserts the employee has to notify his supervisor that he's coming in, but said a 30-second notice is sufficient.

If done, the employee is allowed to come in and go back to work and that way the employee does not lose a day's vacation or whatever he may have been planning to take. But that employee is required to call and let us know. Hayes explicitly asserted where Smith broke the rule was when he came in, he came in late—period; with no explanation for why. The problem with this assertion is the obvious one that Employer already knew Smith had received permission from

his foreman to take the day off for the purpose of attending negotiations, and it was Employer who had canceled those very negotiations.

Hayes continued, if Smith would have called Hayes or Cartrette before Smith came in and let Hayes (or Cartrette) know why Smith was late, and that Smith wanted to come back to work, then more than likely Hayes could think of very few situations where Hayes wouldn't say, "Doug, yes, come on back to work." This assertion advanced is inherently self-serving, and, is also wholly unpersuasive on the facts. Indeed, Cartrette's own statement of receiving a Smith initial call for directions to jobsite surely would have qualified under Hayes' asserted rule of just calling to say he was coming in. Reason 4 is (at best) untenable and pretextually advanced (at worst) shown simply false.

Respondent countered that any apparent weakness with note (sic, reason) 4 of the Work Rules in Hayes memorandum of March 5 is (essentially) tempered because it was but one of five stated grounds for discipline. But I have already found that there was error, if not pretextual and/or false base in asserted reason 2 that claimed that Smith had damaged Cooperative property in violation of Work Rule 11; and, that asserted reason 5 is also unconvincing because of Hayes' clear condonation and approval of a Smith meeting with Hayes, so Smith could present his complaint.

What enumerated reasons are arguably supported of record then are reason 1 (insubordination to his supervisor) and 3 (use of abusive language to his supervisor) but both of which in being commonly related only to the earlier Smith-Cartrette conversation, are supported (at best) only to the extent of Cartrette's (limited) account of Smith profanity said to him, and then, only in context of determined unlawful harassment about the Union on the job, and the coercive and bargaining futility statements that Cartrette had stated to Smith, that were followed by an otherwise unit demeaning statement that Cartrette had provocatively made in the same conversation. Even the (I find) more supported "equally serious conduct" warned about, namely Smith's display of loss of control/temper and profanity appears overstated, if not misstated, in being recorded made in presence of office personnel and consumers of the co-op.

#### (7) The job performance inconsistencies

Before final evaluation of the efficacy of the reasons advanced in defense of the alleged unlawful suspension of Smith on March 5, I address certain other claimed inconsistencies and/or deficiencies raised by General Counsel in regard to Smith's purported poor job performance.

##### (a) *Sleeping on the job*

Smith denies sleeping on the job from time to time. Smith acknowledged on occasion behind the wheel that Smith had dozed off in the truck. Stevens later related he saw Smith sleep on the job twice.

As to Smith's asserted sleeping on the job, Hayes initially stated that he found this out on the day when all this was going on. On another occasion Hayes related that prior to March 5, he did not know that Smith had been sleeping on the job. When asked on cross-examination isn't it true that Smith had never slept on the job, Hayes responded he cannot testify to that, but reasserted *Cartrette* had told Hayes that

Smith slept on the job. Hayes then acknowledged that from March 5 through May 10, he did *not* take any steps to investigate whether Smith was sleeping on the job. When Hayes (thus inconsistently) had acknowledged that he had never investigated it. Hayes then asserted that was the supervisor's responsibility. However, on cross-examination, in asserting that Cartrette had come to Hayes and told Hayes Smith was sleeping on the job as well as failing to cut the bushes and trees properly, Hayes (additionally inconsistently) then acknowledged sleeping on the job is an offense that Hayes would take action about. Hayes conceded that there were no further reports of Smith sleeping on the job. Incredibly, neither Hayes nor Cartrette ever spoke to Smith about sleeping on the job.

Even apart from the above inconsistencies, Hayes admits that Smith was not warned (above) or fired for sleeping on the job (below). On weight of evidence above I conclude and find that (at best) Hayes did not have any report of Smith sleeping on the job at the time of the award of suspension discipline on March 5; and, indeed, it is far more likely than not, from what appears as the more credible evidence of this record, Hayes simply did not have Cartrette's report of Smith sleeping on the job (e.g., from Stevens) before Smith's discharge.

##### (b) *Contended improper job performance*

Cartrette more modestly has asserted his main problem with Smith was Smith wasn't doing his job correctly. Cartrette said he noted Smith had been lax in performing his job from the time when the union negotiations began in late November or December, a period within which, with one night exception, parties were conducting negotiations during the workday. Though Cartrette reaffirmed Smith had performed pretty badly for 2 or 3 months, Cartrette admitted he did not warn Smith at any earlier time about Smith's improper job performance.

Cartrette next asserted that he had talked to Hayes about it, on and off. When asked, if Employer had always resolved (on such occasions) to let Smith just keep working the way Smith wanted to work, Cartrette responded, that's the way it looked. On redirect examination, Cartrette then related that he did not warn Smith more often about his work performance, because everytime he'd try to talk to Smith, Smith would blow up and do like he did. Cartrette asserted that Smith was just the type person Cartrette couldn't talk to. However, Hayes has contrarily testified that Cartrette had never told, or even insinuated to Hayes that Cartrette could not control Smith; and, that Cartrette had just made Hayes aware of the fact that Smith was not doing his job correctly. To the contrary, Hayes says he would just say, "Floyd, you're his supervisor. Look after him and make sure he does his job."

In apparent intended support of Cartrette otherwise, Hayes has asserted that he had talked to Cartrette about Smith's work performance prior to that *several* times. But when then pressed for dates, Hayes was not sure how many times he had previously actually done so. Hayes then asserted he didn't make records of it, stating, because it was not something that he needed to do. But Hayes had made prior note (only) of the earlier Cartrette January 17 report on Smith's exhibited bad attitude, recorded as to job and BEMC. Moreover, Hayes conceded on the day when Smith came in and

complained about Cartrette, Hayes didn't say anything to Smith about Smith's (recent or other) work performance. Hayes has acknowledged that as overall manager, Hayes shouldn't allow an employee to stop doing his job over several months. In then asserting that in this situation maybe he did, Hayes raised in defense of his inaction the adage that hindsight is 20-20 and by that Hayes meant maybe Hayes had let things go further than they should have before he did react, because, again, Smith is a very likable person: and, Smith was a very good worker when he came to work at BEMC. Hayes added, as a working (essentially) mentor had once told Hayes, you should give a person all the rope you can and let them use it to either climb with or hang themselves; and Hayes guessed that's what he was doing, and hoping Smith would climb with it.

This claim or working adage would have had more viability if it were not accompanied by a suspension of Smith for a week on the basis of a number of listed supporting reasons that were shown substantially not well founded, indeed, weakened to point of more showing of their pretextual or false nature.

Hayes related that Cartrette informed Hayes that Smith was not doing his job like it should be; that Smith was not cutting around the poles, which was *very visible* when Hayes investigated it thereafter in the field before Hayes awarded the suspension. As noted, Cartrette has asserted Stevens had recently brought that complaint to him, though Cartrette knew it as well. Before final evaluation of the suspension of Smith on March 5, I address Employer's reliance on the purported recent Stevens stated concern to the point of quitting.

(c) *Stevens support*

According to Stevens, Smith was a good worker; and, Stevens thought of Smith as a good friend. At the outset I note Stevens initially asserted it was in the year prior to Smith's discharge (roughly coextensive with the period of Smith's union activity) that Smith's work performance slowed down.

Stevens next related that shortly before Smith's discharge (in May), Smith was not shrubbing bushes around guys and poles like he had been; and, Smith was just liable to sit in the truck half a day, or just ride around. Stevens also recalled that on occasion Smith had told Stevens that if Smith didn't take it easy or sleep half a day that Smith wouldn't be justified, he would be losing money. Though Stevens did not recall when Smith made the latter statement, he estimated it was a couple of months, or more, before Smith was discharged, thus (essentially) during the negotiations held earlier that year.

Stevens generally asserted that he was scared and worried that he would lose his job on account of Smith not doing his work properly, because when Foreman Cartrette wasn't there, Stevens was supposed to be over Smith. Stevens initially asserted he was scared if Smith didn't do that there (sic, Smith's groundsman's work) they would fire him (Stevens), or, that it would go against Stevens. In contrast with claimed friendship with Smith, Stevens remained unsure whether Stevens had ever spoken to Smith about Smith's job performance either before or after any Stevens' purported (recent) concern about his job was stated to Cartrette; or even after Cartrette recently talked to Smith about Stevens being about ready to quit because of Smith's failure to do his work.

Indeed, Stevens was not sure if Stevens had *ever* talked to Smith directly about Smith's work performance. Nonetheless, Stevens has asserted that he went to Cartrette and asked if Cartrette would talk to Smith about it, because Stevens was scared that if he didn't (with) Smith's job not being done like it was supposed to be, that it would be on Stevens, and Stevens didn't want it on him; and, Stevens wanted to clear himself. However, on other occasion *Stevens testified he guessed he told Cartrette that he needed to talk with Smith and get Smith straightened up so it wouldn't be on Stevens.*

Stevens asserts that he was worried about being fired, and as a result, Stevens told various people that he wanted to quit. Stevens relates that he didn't really want to quit; and, he didn't really want to get fired; he just wanted to keep his own record clean as a worker. However, Stevens has also acknowledged that he had previously told Smith that Stevens was ready to quit *because of Cartrette* (and, Hayes confirmed Smith had told him that earlier).

Stevens had held that view apparently since even before Union activity. Stevens recounted an occasion, which he thought was before the union activity, where they were working on the machine (radiator) out there; and, Stevens tightened up a water hose. Though leading into subject with asserted reckoning he had just had a bad day or something, but didn't know, Stevens then said that Cartrette told Stevens he had tightened it too tight. Stevens didn't think you could tighten one too tight, but Cartrette loosened it up. Stevens otherwise *generally* testified that Cartrette *is* a difficult man to work with, because he's just got some ways about him. Stevens explained Cartrette's liable to tell you we (are) going to do this this way, and when we get out there on the job we'll do it another way, and (as a result) you stay a little confused; and you never know what to expect.

Stevens acknowledged that Smith didn't like how the Company was paying. At first Stevens asserted that he didn't know what Smith had said about that. However, then Stevens acknowledged that Smith had talked to Stevens about the Union on the job; that they would just talk about what went on in negotiations; and that Smith had said, we were going to go for all or nothing (or none), meaning to Stevens (all) the money that they was asking for.

Though initially denying it, Stevens in the end has also revealed his own strong animus to the Union. After claiming that he was not against the Union, which he initially said had its good and bad points, Stevens then said, this union stuff has caused a lot of friendships to be busted up and everything; and he just don't like that; it just worried him. On cross-examination Stevens further testified that before the Union was certified as exclusive bargaining representative of the unit the atmosphere was one easier to work in for him, in that people were friendly to each other; and, everybody would laugh and cut the fool, and joke with each other, including Foreman Cartrette sometimes. Stevens has acknowledged that since the Union came in Cartrette had changed; and that (inconsistent with lack of Cartrette oversight of Smith's work performance for any such substantial period of time) Cartrette's been a little tougher on everybody.

Perhaps most revealingly in the end, Stevens has stated that the reason that within the past 5 months Stevens had spoke of quitting his job, was mainly about everybody being busted up. Stevens explained: Everybody's not united and

everything together like they used to be. There is a dividing point. You're either in the Union or you're not. It's like there's two different sides there. Though Stevens stated he did not want to come here today, as he is a friend of Smith's, Stevens has acknowledged that he really has been unhappy since the Union has been in BEMC; and, that he did not want to be a part of the bargaining unit. Indeed, Stevens acknowledged that he wrote a letter to BEMC requesting his classification be withdrawn from the bargaining unit. In contrast, Stevens acknowledged Smith was always talking about what the Union can do for Stevens; and, when Stevens thought of the Union at BEMC, Stevens sort of thought of Smith.

#### Analysis

In the above circumstances, it seems inconceivable to me that Cartrette would not have mentioned Smith's sleeping on the job immediately to Hayes, if such had then been reported to him by Stevens; and similarly inconceivable to me that neither Cartrette nor Hayes would not have thereafter (at least) talked to Smith about his reported sleeping on the job. However, even apart from when (more probably) unit employee Stevens may have told Cartrette that he had observed Smith sleeping on the job, Hayes has unequivocally related that in his additional investigation, *Hayes went out with Cartrette and observed the sites of Smith's (purported) recent poor job performance the workday before Hayes deficient reasons.* Yet the warning is silent thereon. Not without foundation does General Counsel argue Employer's failure to address Smith's purported poor job performance in its warning confirms the overall pretextual nature of the entire warning scenario.

Thus sleeping on the job aside, only then the more strangely does the suspension and warning (at outset noted) not only not include any reference to: (a) Smith's poor job performance that had purportedly brought on Cartrette's confrontation with Smith that day to begin with; but (b) also has no reference to it despite it being the subject of a personal inspection made by Hayes but the day before, that was accomplished by Hayes with the very purported purpose to assure a thorough investigation, and with improper performance of groundsman work then purportedly appearing *very visible* to Hayes, but which has remained unstated, while weak reeds of reasons for the suspension are advanced.

This is simply far too strained for my acceptance. To the contrary, I presently conclude and find, that whatever may otherwise be determined of the issue of a nondiscriminatory base for Employer's warning of March 5, a job performance deficiency in Smith wasn't then any part of it. The absence of such a reason in the warning is thus to be more reasonably accounted for on the basis that Hayes, after his recent investigation in the field, didn't regard Smith's job performance as then an issue for discipline. To extent Employer has now advanced that it was then under active consideration, and meritorious, but not made part of the warning for some reason altruistic to employee Smith, the same is more readily apparent as but false explanation for an action not then taken; and, in my view, more now explainable as a post facto attempt by Employer to blacken Smith's general job performance of that time for still other background purpose.

In any event, when the reasons advanced by an employer in support of a claimed nondiscriminatory suspension of a

leading union advocate, are shown, as they appear here, in large measure as not only weak and inconsistent, but as being in significant measure pretextual and false, and, as here, are accompanied by other shotgun claims that have fallen by the wayside, whether only in the end upon a considerable review (e.g., poor job performance, sleeping on the job, etc.), or did so early and relatively more easily (truck damage and request for time off to see a doctor; or, antedate prior good evaluation (e.g., advancement of an alligator capture incident, displeasing to Batten), the finder of fact is entitled to look elsewhere for a real motivating reason for the discipline, without need of further addressments, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

This is not a case of reasoned employer discipline for Smith's loss of control in the presentment of his grievance that offended others. I am wholly convinced on the basis of the above inadequacies, inconsistencies, pretextual and/or false nature of the other reasons advanced in support of the suspension, and considerations of other evidence noted above (and below), that the real motivation for the suspension of George Douglas Smith on March 5 was in fact discriminatorily tainted, if not discriminatorily based; and, in either event, the suspension discipline was in violation of Section 8(a)(3) and (1) of the Act.

#### (8) Smith's related grievance filed on March 4

Hayes didn't know what kind of grievance Hayes expected Smith to file; adding, that was Smith's decision to make. Hayes asserted that from what Smith had told Hayes it was because Smith just couldn't get along with Cartrette. Hayes needed to know, in writing, why Smith couldn't get along with Cartrette, so Hayes could follow up on it. Hayes assertions fail to address clear import of Smith's account of Cartrette's discriminatory conversation as formally declared in the grievance that Smith filed.

The grievance filed by Smith is dated March 4, and states, "On 2-28-90 Floyd Cartrette made comments and statements to me that were both personally upsetting and violations of labor laws." (To that extent, it is clear that Smith's claims in those respects are not of recent fabrication, but rather were timely raised to his Employer for its objective review.)

Smith proposed for company action to adjust his grievance, "I wish to be moved to another Dept. Floyd has no respect for me or other emplys [sic]. I think it would be better for all concerned if we were seperated [sic]. It is thus reasonably supported that Smith's above credited testimony of Cartrette's statements to Smith (i.e., that had unwarrantedly demeaned both Smith's work performance and the qualification of Employer's first-class linemen), were additionally not of recent fabrication. Indeed, Smith's grievance presented Smith claim that Hayes had been aware of the problem for some months; and, that Hayes had already talked to Smith and Cartrette.

Batten confirmed Smith filed that grievance (R. Exh. 8) with Batten: and, that Smith had asked that he be transferred to another area of work. Batten states that there were no vacancies into which Smith could be transferred at the time. The General Counsel has established Batten answered the grievance without any reference to vacancies. Rather, in response (next), Batten said Smith's attitude to BEMC was his problem; and, "I think that you should stay in your present job and continue to work on your relationship with Floyd."

Batten has acknowledged he never did tell Smith that Batten couldn't transfer Smith because there was no vacancy. Batten then stated (in clear afterthought), all job vacancies are posted on the bulletin board; and there were no jobs posted, so Smith was aware of that, as well. On March 30, Batten issued his final written ruling as follows:

I have carefully reviewed the facts and circumstances surrounding your recent event with Floyd. I understand that Mr Hayes has talked to you and Floyd about better cooperation. My information indicates that you and your attitude about BEMC is the primary source of your problem. Transferring you to another job will not be the solution. I think you should stay in your present job and continue to work on your relationship with Floyd. Let me know how this progresses.

Batten testified that Smith never came back to Batten to let Batten know how Smith was progressing in his relationship with Cartrette. (Hayes also inquired of Smith how things were going, though seemingly after January 17 discussion. It is clear (neither) Batten (nor Hayes) addressed the known union advocate Smith's grievance claim that Cartrette was involved in the conduct in violation of labor laws, as has been determined herein. However, I conclude otherwise as to any argument by General Counsel as to job transfer.

(9) Smith's request for transfer

As noted, Smith and Norris (Hayes and Coleman) confirmed that Smith, who was a groundman for heavy equipment or right-of-way, had asked Hayes to be moved to a line crew. It is clear that he formally did so in grievance filed with Batten.

Herring is the supervisor of construction in Smith's district. Three line foreman, each with his own crew, report to Herring. (The foremen are: Mick Duncan, Coleman, and Etheridge.) Although Norris hadn't worked out there (on line crew), Norris stated his understanding was Smith could start out doing a groundman's job on a line crew, and learn the ropes. Norris believed that at the time the start pay for both was the same, \$5.25.

On the matter of job filling or transfer, Hayes has recounted that hiring is from within as much as possible. The Company's policy on transfers from job-to-job is that any time there is an opening in any position, it's posted for 5 days on the bulletin boards in all district offices, main office, and all offices. Hayes has testified (essentially with corroboration of Batten, and without contradiction), that to his knowledge there are *no* transfers without a job opening. When Smith asked Hayes to *transfer* him, there were no vacancies in any area at that time. All vacancies are posted on the bulletin board; and, Hayes thus knew there were none available. (Complaint does not allege that Smith was discriminatorily denied a job transfer.) In any event, I credit Batten and Hayes that there was no open job open in line crew at the time to which Smith could have transferred. There remains job cross-training.

Hayes has relatedly also stated, Smith worked on Cartrette's right-of-way crew as a heavy equipment groundman; and, that if there was an opening, Smith could have applied, and been transferred to a line crew as a groundman and *cross-trained*, which usually is for a month,

before return to his regular job. Coleman adds cross-training was pretty common at the time; and he confirmed cross-training wasn't done through job vacancies. According to Coleman, if Smith had been selected to cross-train into another crew, somebody would have probably just asked that Smith be able to go into another crew and work for awhile so that Smith would be familiar with some of it. If any employee was displaced, they would just swap them to another crew. Indeed, Coleman recalled that at one time, every 6 months, they would take a man off of each crew to work on different crews.

Hayes confirmed that cross-training is not a job transfer. In that regard Hayes explained however, you do not take a groundman and train him to be a lineman. There are several steps in between. There is a right-of-way crew and a line crew. A groundman on each one of those crews are groundmen, but they are entirely different jobs; and they call for different types of work.

An apprentice lineman, or line foreman can do right-of-way work, because he was trained in it back in his earlier days. But a groundman cannot do linemen's work. They can cross-train employees within those areas; but safety is their main concern, because you can get killed just like this (quickly). Hayes has testified that he didn't transfer Smith for cross-training (to get Smith temporarily away from Cartrette for even that period of time) also because he couldn't get anyone to transfer into heavy equipment right-of-way crew, naming Long as one he had asked, and who had refused.

In that regard however, other Coleman testimony revealed performance of even more temporary cross work on line crew was not that extraordinary. Thus, Line Foreman Coleman acknowledged that he had worked Smith before, on a slack day, though not in cross-training period. Coleman confirmed with regard to heavy equipment crew (including Smith), "if their machines are tore up or something like that and they have an extra day, and if they are not taking off, then they come out there and work with us (line crew), whether it is on work overhead, or underground, or trimming trees, or whatever." Coleman acknowledged they had changed members of a crew pretty informally, based on work (need), without problem. While the argument is deemed unnecessary to support the violation found, as noted (above), Coleman has testified that he heard Smith say that he would do anything, if Hayes would take him off Cartrette's crew.

The notice provided to Employer from Smith's grievance filed on the now determined Cartrette violation of labor laws establish that Employer had timely notice of Smith's claim in that matter, and Employer's failure to address the same in its answer to Smith's grievance appears further supportive of the violation found. However, in light of Hayes' apparent reasonable attempt and stated inability to make cross-training available to Smith, the failure of the employer to afford Smith cross-training as a groundman elsewhere is not as supportive, though such had been commonly done for the other right-of-way crews in the recent past, with apparently some undesired transfers affected.

4. The alleged unilateral changes in unit positions made in violation of Section 8(a)(5) and (1)

The complaint alleges that in violation of Section 8(a)(5) and (1), on or about March 1, Respondent Employer unilaterally



ally, without notice to or bargaining with the Union, removed the duties of the drafting and mapping coordinator, and the load management coordinator from the above-described appropriate unit.

*a. The (new) enineering assistant supervisor position in comparison with drafting and mapping coordinator unit position*

General Counsel's witness, Judy Russ, is presently employed by BEMC at its Shallotte Headquarters Office as a service coordinator under the supervision of Operating Manager Bobby Gore. Russ shares an office with Beryl Hall (the former drafting and mapping coordinator).

Russ identified General Counsel's Exhibit 8 as the job vacancy for an engineering assistant supervisor position that was posted probably about a week before the listed due date of March 15 (thus about March 8). That notice of job vacancy stated there was now an opening for the above-engineering assistant supervisor position and that applications from any person were being accepted for it. A copy of the position description (job specification) for that vacant position was attached. Russ applied for this position. Hall was awarded it.

Russ identified General Counsel's Exhibit 10 as the job description for the drafting and mapping coordinator, that Russ had received from Nancy Dimery, BEMC personnel director. Comparison of General Counsel's Exhibit 10 with General Counsel's Exhibit 8's attachment of the position description for the new engineering assistant supervisor position reveals that the new position description of engineering assistant supervisor contains a description of (essentially) the same job duties as are contained in General Counsel's Exhibit 10's job description for the drafting and mapping coordinator. General Counsel's Exhibit 8's job description for the engineering assistant supervisor however contains certain educational requirements and certain supervisory duties not found in General Counsel's Exhibit 10.

Thus, General Counsel's Exhibit 8 reflects that the engineering assistant supervisor is to direct drafters, and report to the systems engineer, whereas the drafting and mapping coordinator reported to the manager of operations and directed no one. General Counsel's Exhibit 8 also shows the engineering assistant supervisor with certain assigned responsibilities in a preparation of that position description and the position descriptions of all personnel reporting to that new position; and, in assisting in interview and recommendation for the hire of such employees (in accordance with established policies and procedures), as well as in their performance appraisal, and required counseling.

Additionally the new engineering assistant supervisor position required educational requirements of a B.A. or B.S. degree with a background in graphic design, and 1-year experience and training in Auto Cad mapping and associated software (as compared with the drafting and mapping coordinator's requirements of only a high school diploma, and, only a declared preference for additional training in drafting and drawing). Experience, job knowledge and abilities, and skills requirements of the two positions appear to be essentially the same.

*b. The (new) load management supervisor position as compared with the load management coordinator unit position*

Russ also identified General Counsel's Exhibit 9 as a job vacancy for a load management supervisor position that was posted at the same time. Employer awarded the load management supervisor position to Terry Stevens (former load management coordinator).

Russ identified General Counsel's Exhibit 11 as the job description for the load management coordinator, that Russ similarly received from Demery. Comparison of General Counsel's Exhibit 11 with General Counsel's Exhibit's 9's attachment of position description for the new load management supervisor position reveals the new position description of load management supervisor contains a description of (essentially) the same job duties, and educational requirements, as are contained in General Counsel's Exhibit 11's job description for the load management coordinator. However, General Counsel's Exhibit 9's job description for load management supervisor contains certain required experience and supervisory duties not found in General Counsel's Exhibit 11.

Thus, although either load management position is to report to a manager of operations and/or systems engineer, the new load management supervisor is to direct (unit) electronic technicians (whereas the load management coordinator directed no one). General Counsel's Exhibit 9 similarly shows the load management supervisor with certain assigned responsibilities in preparation of that position description and the position descriptions of all personnel reporting to that new position; and, for assisting in interview and recommendation for hire of employees (in accordance with established policies and procedures), as well as in their performance appraisal, and required counseling.

The new load management supervisor position now requires 3 years' load management operation experience; and, that job knowledge be able to support existing computer software and ensure its adequate function, as well as now (explicitly) have a broad working knowledge of switch installation and maintenance of same, and, have effective knowledge of the system, and its parts. Otherwise, education, experience, job knowledge and abilities, and skills requirements appear to be essentially the same.

*c. Employer's economic defenses*

*(1) The new engineering assistant supervisor v. former drafting and mapping coordinator*

Leavitt has testified as to in-house engineering development background in explanation for the Company's creation of the engineering assistant supervisor. The Company hired Louis Shaw as a licensed engineer or a degree engineer for the system in April 1989. The co-op hadn't had a system engineer before this.

This engineer hired in April 1989, was never in the unit. (The election was September 19, 1989.) The engineer is over (in charge of) that department which (now) includes the (new) position of engineer assistant supervisor. Leavitt confirmed the Company has hired Beryl Hall, the former drafting and mapping coordinator, to fill the engineering assistant supervisor position.

Leavitt explained the engineering assistant supervisor works together with the engineer in developing computerized mapping, using auto cad [sic, cad]; tying that mapping together with computerized engineering packages; and, also developing special equipment inventories that BEMC needed. The engineer in charge has other responsibilities. Leavitt asserts the intent is the assistant engineer *will have* supervisory responsibilities over a drafter when hired.

Leavitt relates the co-op has been growing significantly over the last 15 years, though immediately correcting there was a little bit of a slowdown over the last 2 years, but then reasserting that slowdown has been in services, not in the system size. Leavitt recounts that the system has grown continually somewhere between 5 to 10 percent each year.

In explaining the initial hire of the engineer, Leavitt asserts that there had been a need for a system engineer for a while. They had been contracting out their engineering services in the past. They were pretty comfortable with that situation for some of their distribution work, but they were having more and more of an emphasis on transmission, state of work, doing some long-range engineering studies.

Leavitt explained that Jim Word, REA accountant, had requested that they get a long-term engineering study completed. In that regard, Batten testified that BEMC borrows money from the Federal Government. Presently, it has about \$35 million of loans outstanding through REA, a branch of the United States Department of Agriculture (USDA). BEMC needed to get that data together (first) to evaluate that data. Engineering department was going to do a lot of that. Leavitt asserts Engineering (seemingly transmission) was also going through a retirement and a transition, so they also wanted to beef up their transmission staff. Another consideration was there were computerized engineering packages of the co-operatives that had become very important.

The computerized packages were a way to look at voltage drops and make some very important calculations. Moreover, the development of a software auto cad/cam (automated drawing, or computerized drafting program) had begun to play a big part of the whole specter of computer mapping, from system to truck maps of power lines, for servicemen and operations people to use. New technology in mapping gave the Company an opportunity more and more to develop almost on line real time view of their system, for a better, and more timely evaluation of their system, as developed in-house. The computerized packages would also help BEMC to do needed engineering analysis, almost on a regular daily basis.

As part of their drive toward getting better engineering and a better view of their own system, by developing the maps, they looked at the cad situation, and got together a group called Inter-tech out of Atlanta along with in-house computer installation they were having at this time. They selected the best mapping and cad packages that they could find (over 4 years). They then determined that they needed someone with expertise in the area of computerized cad mapping, more than just a manual drafting. Thus, they created and posted the job position of engineering assistant supervisor for that duty. They had internal applicants for the job. Beryl Hall (the former drafting and mapping coordinator) was hired and put into that job.

Leavitt acknowledged the old position of drafting and mapping coordinator is at this point just sort of *dormant*.

There's no one in it; as there is not a need for it right now. Whether there will be a need for it, depends on expansion, Leavitt asserting there possibly could be. However, Leavitt has asserted that under the engineering assistant supervisor position, they still needed someone to do digitalized drafting, manual routing that they had done before. Leavitt related they have recently posted a position for a drafter within the last few weeks, with applicant interviews asserted to start in the near future.

(2) The local management supervisor v. load management coordinator

Leavitt testified that BEMC buys power from their power supplier NCEMC. BEMC is billed on three facets: demand; energy purchase; and wheeling charge. The cost on that bill has changed significantly over the last 10 years. Energy purchase used to be the largest part of the bill. Now it is demand. Demand accounts for about 60 percent of BEMC's bill each month. Leavitt asserts relatedly that the need for load management has thus increased in recent years, because of the cost of the KW charges per demand. Cost in the last 10 years has increased somewhere around 100 and some percent.

In the last 6 months BEMC put together a position called load management supervisor. That position has responsibility for monitoring load management and supervisory data acquisition (SDA) (involving) an ability to look at the actual voltage position of all substations BEMC has on line. With such actual data back in-house, BEMC can do some management of voltage at that point.

Leavitt asserts BEMC has the possibility of being able to save the sum of \$200,000 a month by control of their peak demand. Leavitt explained the system is taxed on the basis of the highest point of demand for power during a 30-day period. If BEMC can shave that (peak) by what their load management capabilities are, they could roughly save \$200,000. Thus far they've saved a significant amount of money, both in their cooperative and on a statewide basis. Leavitt relates that it will also save BEMC some future rate raises with the Federal Energy Regulatory Commission (FERC).

Demand is defined as the highest point, or the highest peak load at one point that BEMC has at anytime during a 30-day period. A load management system is (essentially) involved with putting on individual on/off switches on water heaters and air-conditioning, in order to shave the peak so BEMC doesn't have to pay the billing charges over a certain (high) point. If BEMC can keep that (peak) down and figuratively speaking fill the valleys, then, BEMC doesn't have to pay as much for demand, and it can get the same KWH energy sales.

Leavitt stated on direct examination that the position of load management coordinator has become more and more demanding over the last 3 years; but clarifying (even earlier), really since the inception of the load management program, which it seemed to him was begun in 1983, with statewide discussions in 1984. In that regard, Leavitt related that after a few of the counties had initially experimented with load management, 27 of 28 co-ops went together on load management to make the purchase of load management cheaper and simpler. NCEMC helped BEMC to put together a load

management package so that BEMC could coordinate its demand.

BEMC has the arrangement directly with NCEMC. Basically, NCEMC will bill BEMC for its peak demand. If BEMC can shave its coincidental peak demand, then, BEMC saves money, which in turn directly saves NCEMC money on their power bill with CP&L or Duke or whatever. In fact NCEMC has a direct tie line into two of BEMC's stations; and, NCEMC thus controls (apparently a statewide) load management from Raleigh.

BEMC however has to make contact with a power supply division of NCEMC. Previously, Gerald (sic) and Bob Gore made those operational decisions. (Batten, who was BEMC's representative to NCEMC, and a contact person, was involved in the billing side. Leavitt was involved in monitoring peak strategy.) BEMC has however now created the position of load management supervisor to have a direct contact with the operation in Raleigh; and, to make decisions about the noncoincidental peak, i.e., when, after statewide comes off load management operation, BEMC then has to control its own peak.

BEMC began to put together a system of how to install switches which was the first emphasis on load management. SDA really hadn't evolved at that time, at least not from BEMC's standpoint. However, demands had been increasing for several years; and Leavitt estimated, in the last year and a half, particularly on load management switches themselves, BEMC would install an increase of about 40 percent on the switches themselves. This began before the union campaign started.

The position of load management supervisor was posted; and, it was awarded to Terry Stevens, who had been, previously, the load management coordinator, a bargaining unit job. According to Leavitt the difference in the job now is that in the last 5 years they had put more and more of an emphasis on load management. The dollar savings were a lot greater; and, the responsibility had grown. Consequently, BEMC wanted the load management coordinator position to carry a larger responsibility on the load management side.

The new position of load management supervisor thus has the control over when to go into load management strategy. The position has the responsibility for setting peak strategy, and for making sure BEMC works their load management strategy in coordination with what the statewide group strategy is.

Leavitt has asserted that a single mistake in one peak period could cost BEMC almost \$200,000. Thus, Leavitt stated BEMC can save that much in a month by operating within a capability of 17-21 (sic, seemingly \$17.21) per KW. Leavitt related BEMC has capability of operating about (or seemingly) reducing (to) 13,000 kilowatts, with Leavitt in any event (roughly) calculating possible savings therefrom closing on \$200,000.

Though it would appear Leavitt may have described a maximum saying not nearly presently achieved, the apparently presently realized savings are not insubstantial. On recross-examination Leavitt testified that in 1988 they had roughly 5000 switches on; and on each such switch they save roughly .8 KW. In money it was .8 times 5000, or 4000 KW times 1721 (sic, seemingly \$17.21) or (in any event) as he estimated roughly \$68 to 70,000. Leavitt has also testified that BEMC has increased load management switches some

40 percent over the last 3 years; and he would have it observed there was a related increased responsibility or need to manage these switches.

Leavitt testified that the present load management coordinator does (sic, did) not have supervisory responsibilities over other employees. The present load management supervisor (Leavitt asserts) does, namely, he supervises and does the evaluation on the two electronic technicians at the Shallotte office that install the load management switches.

Initially, Leavitt asserted the responsibility for making load management decisions had been changed from operations manager Gore to the load management supervisor. Leavitt (with some direction) later clarified, that Gore still can make those decisions; and, that Gore still gets in on the strategy discussions. Leavitt then more qualifiedly stated, the difference now is the load management supervisor has direct input, can and will make those decisions independent of Gore, unlike the load management coordinator before.

Leavitt has summarized that the main difference in the old and new load management job description is expanded responsibilities, i.e., the (new) load management supervisor would have more responsibility in the SDA area, and particularly controls working the SDA; more or basic say so in when we would set load management demand control strategy; and, he reasserted, in evaluation and review of employees, including every day administration of employees' work.

In contrast, the General Counsel established General Counsel's Exhibit 12 is a timesheet for Dwayne Reynolds and Dana Mauldin. Reynolds is an electronic technician who installs and repairs switches, under the supervision of the load management supervisor. However, Reynolds' timesheet is okayed by Tex (Dale Wayne Holden) who is not the load management supervisor. Moreover, final approval of all timesheets comes from district or operation managers. (G.C. Exh. 13 is another timesheet for Reynolds and Mauldin. This timesheet is also okayed by Tex.)

The above daily timesheets cover 5/31/90 and 6/1/90. Leavitt acknowledged that Tex Holden's job is operations assistant. Leavitt relates Holden is also a licensed electrician; and, installers (electronic technicians) have to work under Holden's (craft) supervision through an attorney general's office (order). Leavitt explains that there was an issue all over the state with electrical contractors about electrical work BEMC (and others) were doing, inclusive of installing load management switches without certain electrical inspections, and, without a licensed electrician working with the installers. Holden presently approves the timesheets so BEMC can show that they (their switch installations) were approved by a licensed electrician. Leavitt asserts without documentation (though without apparent contradiction) that the load management supervisor grants time off and evaluates electronic technicians.

Leavitt didn't know whether the election was held pursuant to a stipulated agreement or directed election. Leavitt had initially asserted the Company's position was that the drafting and mapping coordinator and the load management coordinator weren't bargaining unit positions, but were supervisory positions, though Leavitt immediately retracted in saying that he couldn't be an expert on that specific issue. In that regard, Leavitt (only) knew there had been a hearing to determine which positions would be in the unit.

Leavitt had no involvement and was not present at the representation case hearing on the unit composition which was held in the courthouse at Southport. Although Leavitt did not know that the Union opposed these positions being in the bargaining unit, Leavitt later acknowledged that he would not be surprised if told the Company's position (then) was that they should be in the bargaining unit; though there does not appear to be affirmative evidence it was the case.

In any event, Leavitt acknowledged that they (the positions) were in the bargaining unit when they (employer) was presented with the documentation (seemingly, certification); and, they were both in the contract when presented (proposed). Significantly, Leavitt acknowledged that the *Employer has never negotiated with the Union in regard to the changes made in the drafting and mapping coordinator and in the load management coordinator positions.*

#### Analysis

The Employer has presented clear valid economic reasons for its as clear unilateral action in creating new positions of engineering assistant supervisor and load management supervisor, that continue to do some unit work. It is clear the performance of the load management supervisor position as newly constituted, may have direct and substantial bearing on Employer's costs. However, it is also clear that apart from any supervisory and/or managerial functions that may have been added to the newly created positions of the engineering assistant supervisor and the load management supervisor (and, apart as well from whether fully exercised or not), the two individuals occupying those positions (respectively) have continued to perform in very substantial measure and nature the same unit work they previously had performed while (respectively) occupying the above-unit positions of drafting and mapping coordinator and load management coordinator.

General Counsel correctly observes that the Board has long held that an employer violates Section 8(a)(5) and (1) when, without bargaining, it invests bargaining unit positions with supervisory authority sufficient to take them out of the unit while it continues to assign them substantial bargaining unit work to perform. While an employer is not inhibited by the Act in selection of its supervisors, employer may not in designating a unit employee a supervisor (and/or manager), effectively either eliminate bargaining unit positions without the union's agreement, nor transfer unit work to be performed by nonunit employees, without the employer first bargaining with the Union in good faith to impasse, *Facet Enterprises*, 290 NLRB 152 (1988), *enfd.* in part *Facet Enterprises v. NLRB*, 907 F.2d (10th Cir. 1990); *Fry Food*, 241 NLRB 76, 88 (1979), *enfd.* 609 F.2d 267 (6th Cir. 1979).

This would appear to be readily so here, whether former unit position of load management coordinator now stands in simple disuse with creation of load management supervisor position, or as with the drafting and mapping coordinator unit position stands dormant, but may be filled by the Employer only with some unpredicted future expansion (or even if it is projected some limited drafting need of the latter, were potentially to be reconfigured in some partial unit work discription for anticipated new unit employee hire in the near future).

Thus, where (as here) there is no bargaining on the subject at all, and thus necessarily there has been but unilateral ac-

tion on the part of Employer, and individuals who have been designated as supervisors and/or managers have no less continued to perform in large measure unit work that is substantially of the same nature as they had done before, it matters not whether the Employer by its above unilateral action is to be viewed as having effectively altered the composition of the unit, as by creation of a new supervisory position, leaving an old unit position in disuse, or dormant and unfilled, effectively reclassifying a unit position to nonunit supervisory job (a permissive subject of collective bargaining), or, has created a new supervisory position and invested it with unit work, and in that manner effectively transferred work out of the unit (a mandatory subject of bargaining), *Facet Enterprises v. NLRB*, *supra*; *Fry Food*, *supra*.

Accordingly, I conclude and find that by Employer's unilateral conduct on March 15 in designating the two unit employees occupying unit positions of drafting and mapping coordinator and load management coordinator to the new supervisory (and/or managerial) nonunit positions of engineering assistant supervisor and load management coordinator supervisor, with improper continued assignment of unit work to be performed by them, without notice and bargaining with the Union, Respondent Employer violated Section 8(a)(5) and (1) of the Act.

#### 5. The alleged *Weingarten* violation on March 27

The complaint alleges that, on or about March 27 and acting through its supervisors and agents at its Oak Island facility, District Manager Don Hughes and Supervisor Martin Register, Respondent BEMC: (1) denied the request of its employee Michael F. Sullivan to be represented by a representative of his own choosing during an interview which Sullivan had reasonable cause to believe would result in disciplinary action; (2) notwithstanding that fact, conducted an interview; and, then issued a written warning to Sullivan; all in violation of Section 8(a)(1) and (3) of the Act.

Sullivan is a second-class lineman under supervision of Martin Register. Sullivan was involved in a traffic accident on March 22 (Thursday). He called Register who came to the scene of the accident. After a state trooper wrote out a citation to Sullivan on a moving violation, Register then talked with the other driver; and, he advised the lady that was involved that there would be no problem with the insurance taking care of it. Register then asked Sullivan to write up a statement telling what had happened at, or caused the accident.

Sullivan acknowledged on the days (sic) Register asked Sullivan to prepare a statement for him, Sullivan did not recall asking Register to be represented in any way in the preparation of his statement. Indeed, Sullivan didn't recall ever asking Register to be represented in connection with the preparation of this statement. On cross-examination, Sullivan also couldn't remember what day he gave his written statement to Register. At first, Sullivan thought he gave it to Register on the same day that they had the meeting, but Sullivan then acknowledged he might have given it to Register the day before; and, indeed, Sullivan later testified that he (Register or Hughes) would have probably had to (have) had it the day before to have (had) something (the written warning) prepared for the meeting.

Sullivan relates that on March 27 (Tuesday), Sullivan, along with Clayton Rivenbark, attended a meeting held with

District Manager Hughes and Supervisor Register. Sullivan had asked Rivenbark, his shop steward, to come with him to the meeting(s). Sullivan recounted Hughes told Rivenbark (at the meeting with Hughes) that the office did not recognize him as a shop steward, or any shop stewards at that office; and, that Hughes also said Rivenbark would have no input into that meeting. Sullivan recounts that Rivenbark acknowledged the direction; and, Rivenbark didn't say anything else thereafter.

BEMC has employed Rivenbark about 2.5 years, most recently as apprentice lineman 3. Rivenbark confirms he is an IBEW shop steward, and, on or about March 27, he had a conversation with employee Sullivan, who said he wanted Rivenbark to represent Sullivan at the office on a job related accident he had had. Rivenbark recalled he and Sullivan had first met with Supervisor Register in his office; and later they all met with District Manager Hughes.

Rivenbark has recalled Register asked if Sullivan wanted Rivenbark to represent Sullivan, and both said yes. Rivenbark recalled Register then said "he didn't have no problem with Rivenbark being in there with Sullivan," but Rivenbark couldn't say anything during the meeting. The three then went over to Hughes' office. Rivenbark's account confirms that there, Hughes also said Hughes didn't have any problem with Rivenbark in the meeting, but the Company didn't recognize any shop stewards. Rivenbark confirms that he was not allowed thereafter to represent Sullivan in any way.

Sullivan relates Hughes spoke first; and, Hughes stated what Sullivan was there for, namely, to discuss the accident and *to see what kind of disciplinary action would be taken*. However, on cross-examination, Sullivan acknowledged Hughes stated to Sullivan that *the reason for the meeting was to discuss the disciplinary action that the cooperative was going to pay (sic, but in context take, and see confirming Rivenbark account below)*. Rivenbark testified that at no time before the meeting started did any supervisor say in Rivenbark's presence that the meeting was unnecessary, or that the warning was being issued no matter what occurred. However, Rivenbark has significantly confirmed when Hughes first spoke at the meeting, *Hughes stated the reason for the meeting was to discuss the disciplinary action that the co-op was taking against Sullivan for the accident*.

Sullivan's account then somewhat disjointedly continued, Hughes then asked Sullivan to explain what happened; and, *Sullivan just read off his statement* of what happened. Though Rivenbark initially confirmed that it was after that (his restriction) that Hughes asked Sullivan to state what happened in the accident, and, on at least one such occasion, seemed to affirm Sullivan then read a statement concerning the accident, what happened, where it was at, on other occasion Rivenbark has testified *Hughes read to Sullivan a summary of facts that were written on the warning*, relating (only) that (Hughes reading) was after Hughes had told Rivenbark that he couldn't say anything. Rivenbark has conceded that asking Sullivan to prepare a written statement was part of the Respondent Employer's full investigation.

Sullivan has otherwise related *Hughes asked Sullivan if Sullivan had any questions; and, then Hughes stated that he was going to have to write Sullivan up for it*. Rivenbark otherwise recalled (generally) they all just sat there and talked a few minutes, about the accident; and, that Hughes asked

questions that Rivenbark did not recall. Rivenbark recalled it was after that that they told Sullivan they were going to have to write him up for first offense.

Sullivan has asserted that at the end of the meeting Hughes explained to Sullivan that as a result of the investigation Sullivan was receiving a written warning. Sullivan didn't recall Hughes telling Sullivan that the cooperative had thoroughly investigated the accident, but then acknowledged, maybe Hughes did. Rivenbark recalled Hughes did say that the cooperative and (sic, but in only logically inferable context had) thoroughly investigated the accident; and, Hughes then gave Sullivan the warning, which Sullivan signed.

Sullivan has related that at the end of the meeting Hughes read a summary of facts to Sullivan from the warning that he (and Rivenbark) concede had been (previously) prepared. Sullivan acknowledged he received a copy of the warning the same day; and, on cross-examination, Sullivan recalled Hughes had asked if Sullivan had any suggestions of what they (BEMC) could do to possibly prevent something like that happening again.

BEMC has employed Martin Register for 7 years, and in material time as construction supervisor at its Oak Island district. As such, Register is in charge of the servicemen and lighting crews at that location, drawing up work orders, aligning the work on a daily and on a long-range schedule.

Register confirms Michael Sullivan is under his supervision. On Thursday, March 22, at approximately 4:30 in the afternoon, Register received a call on the radio from Sullivan that he had been involved in an accident and needed Register to come to his location. Register did so.

When Register got there, he saw there had been an accident. Register asked Sullivan if there were any injuries; and Sullivan said, no. Register then asked Sullivan, "Well, what happened?" Sullivan told Register that Sullivan had pulled up to the intersection and stopped. He was on a private driveway coming out of a mobile home park, and started to proceed out onto the road, but there was a vehicle turning in. So, he stopped and backed up; and when he did he backed into a privately owned vehicle. Neither before or during the conversation did Sullivan ask Register if he could be represented.

Register also spoke to the lady that was driving the vehicle that Sullivan backed into; to the two people that were with the lady in her vehicle; and, the highway patrolman that came up after Register did. The highway patrolman told Register that he had issued Sullivan a citation. After the highway patrolman had talked to both Sullivan and the lady driving the car, Sullivan came back to Register; and, Sullivan told Register, that the patrolman had issued a citation to him. Register somewhat uncertainly recalled, it seems like it was for unsafe movement.

First thing Friday morning, March 23, Register informed District Manager Hughes of the accident. Register also at that time asked Sullivan to write up a statement in his own words, what happened concerning the accident, who was involved, and if there were any injuries. At the time Register asked Sullivan to prepare this statement, Sullivan did not ask if he could be represented in preparation of that statement.

BEMC has employed Don Mitchell Hughes at Oak Island for close to 21 years; and in material times as the manager of Oak Island. As district manager, Hughes oversees the entire operations in that district. Hughes confirmed on Thurs-

day afternoon, March 22, employee Sullivan was driving a company vehicle and had an accident; and, that Hughes had first learned of it the next morning, Friday, March 23. At that time, Register informed Hughes that Sullivan had an accident with a vehicle; that Register had gone to the scene Thursday afternoon; and, Register was requesting Sullivan to prepare a statement of what had happened. Hughes had no further discussion on Friday concerning the Sullivan accident.

Register relates it was on Monday, March 26, about mid-morning Sullivan (first) asked Register if Sullivan could have someone to represent him, but *after Sullivan had given Register the written statement Sullivan had prepared*. Register told Sullivan he would have to check and let him know; and, Register did let Sullivan know, later that day after Register had talked to Hughes.

Register met with Hughes, and informed Hughes that Sullivan was wanting to bring somebody in with him during the meeting. Hughes told Register at that time that Hughes didn't have any problem with it, *and what Register referred back to Sullivan*; and (thus, somewhat ambiguously as to when) Hughes told Register that Sullivan's representative could be there (only) as an observer. In any event, Register and Hughes then discussed the accident; and, they went over the statement that Sullivan had prepared.

Hughes confirmed that on Monday, March 26, about mid-morning, Register came to Hughes' office with a statement which Sullivan had prepared. Hughes recalled that they discussed it at length and reviewed the accident from the statement and also from what information Register had from the scene of the accident. Hughes confirmed that it was at this meeting Register asked Hughes would it be okay for Sullivan to have a representative at their meeting; and, Hughes related (clearly) he said at that time, he didn't have any problem with it, but the only way he (Sullivan's representative) could come in would be as an observer.

Hughes had a further conversation about the accident *that* afternoon with Nancy Demery, BEMC personnel director; and, Hughes also had a conversation with General Manager Batten about it. Hughes informed Demery of Sullivan's accident; and, Hughes reviewed Sullivan's file when supplied by Demery. Hughes informed Batten of who was involved in the accident; the nature of the accident from the report which Sullivan had prepared, and the report which Register had discussed with Hughes.

In describing management's procedure, Hughes related the first thing we do (is) we do a thorough investigation, as they did with Sullivan. Hughes had the discussion with Register, who had visited the scene of the accident on the afternoon that it happened. They requested the employee to give a statement to them in writing, so they could have his version of what happened; and, Hughes had all of that at the time he spoke with Batten and Demery.

The procedure then is, they take this information and investigate it very thoroughly and determine if the employee was at fault, i.e., in carelessness in what he was doing at the time of the accident. They also look at the personnel file to see if the employee has had any other prior instances of this nature in the past. (In his review of Sullivan's personnel file, Hughes found Sullivan had had other writeups, but not of this particular nature.) Hughes relates then, after the thorough

investigation, and discussion of it with one another, they go strictly by policy. They went by policy E2.

Hughes has testified definitively it was he who had brought up the subject of discipline. Hughes said due to what their investigation had found, they are to follow policy E2, which meant Sullivan would be receiving a written warning. Demery and Batten agreed that was the thing to do. Hughes candidly explained, that though it was he who had first brought up and recommended the disciplinary action of a warning for this incident, Hughes was getting an okay of management personnel along with it. Hughes acknowledged he had a further conversation on the matter with Register that afternoon.

Thus Hughes relates he met with Register again (that afternoon); and, they reviewed the accident again from the report which Sullivan had prepared; and, they thus had investigated the accident very, very carefully again Monday afternoon. At that time a decision was made; and, their (sic) decision then was to give a written warning to Sullivan. The written warning was prepared on Monday afternoon in Hughes' office by Register in Hughes presence. Hughes had no other discussions on this matter Monday. Register confirmed that on Monday afternoon Register and Hughes met again; they discussed the accident further; and, according to Register, they then made the actual decision to issue a written warning to Sullivan on the accident. Register confirms he prepared the warning that Monday afternoon, and that Register had no meeting on it with Sullivan on that Monday afternoon.

Hughes is in a different building than Register. Register relates (with corroboration of Hughes), that on Tuesday, March 27, Register called Hughes on the phone, and checked with Hughes to see what time Hughes would be available to have the meeting with Sullivan. As Hughes said he was available anytime, Register promptly located Sullivan and informed him they were ready to have the meeting. Sullivan again asked Register if he could have somebody to represent him during the meeting. Register told Sullivan that he could have somebody present, but that person (Rivenbark) could only be there as an observer.

Before they proceeded over to the building, Register also told Rivenbark that he could come in as an observer. Register testified his understanding of that was, he knew Rivenbark wouldn't be allowed to do anything other than observe at the meeting *because they had already made their decision on what action they were going to take prior to meeting with Sullivan and Rivenbark*: so (though somewhat self-servingly, also with supportive evidentiary background) *there was to be no investigation during that meeting*. The three proceeded over to Hughes' office, and went in. Hughes was there, and the four started with the meeting.

According to Register's recollection, Hughes spoke first. Hughes advised Sullivan why they were there, namely, *to show and go over with him the written warning they had prepared and issued*. Hughes told Sullivan his representative Rivenbark could be there but only as an observer. Hughes essentially confirms (though reversing the two statements, that in the meeting, Hughes was the first to speak, and recalled that he first informed Sullivan that Rivenbark could be present, but only as an observer; and, after Sullivan had acknowledged that, Hughes then turned his attention to the written warning which had been prepared on Monday afternoon by Register.

Hughes recounts he then stated to Sullivan that *the reason for the meeting was to go over the disciplinary action which had been prepared, and to explain it to him; that it was a written warning for unsafe movement, and receiving a citation; and, all this was determined after they investigated it thoroughly, and had checked his personnel files also.* (On other occasion Hughes related he didn't say anything to Sullivan about BEMC's investigation of the accident.) Hughes testified that *he (then) read the warning to Sullivan, a statement of the disciplinary action which they were taking; and, then he asked Sullivan, did Sullivan understand the disciplinary action which had been taken at this time.* Hughes recalled he then asked Sullivan to sign the warning; that Sullivan did; and, that Sullivan received a copy of the warning, preparing it himself from the copy machine (in another room), immediately after (affixing) his signature.

When asked what was the company policy regarding union stewards, Hughes replied that he didn't recognize a stewardess [sic], but he would recognize a representative of an employee, if he was going to do an investigation of an accident or anything that might happen, or, if he was going to try to find out some information, indeed, he would invite each and every employee in that he thought would be helpful, or, that they thought would be helpful. Hughes has stated explicitly that he doesn't recognize union stewards as such, but he recognizes them as a representative. Hughes also has testified he doesn't presently have a contract with the Union that defines what a union steward is.

Hughes and Register have testified in mutual corroboration that at no time during the meeting did Hughes or Register ask Sullivan to read the statement that Sullivan had prepared; or, to read the statement he had prepared out loud. At no time during the meeting was Sullivan asked by either Hughes or Register to explain what had happened at the scene of the accident. In specifically denying that he had asked Sullivan to read his statement, Hughes summarized cogently, Hughes did not ask Sullivan to read the statement that Sullivan had prepared or to explain what had happened because (at that point) Hughes didn't feel like he needed to, for they had already done a thorough investigation. Hughes had Sullivan's statement; had read it; had again reviewed it very, very carefully along with Register. So (Hughes felt) they had done a thorough investigation, and at that time they didn't need to discuss the incident.

In that regard Hughes and Register have both also mutually testified the decision to discipline Sullivan was made the day before based on: information that Register had already obtained at the scene of the accident, from Sullivan, a citing policeman, the driver and passengers of the other vehicle; Sullivan's subsequently prepared (written) statement; the highway patrolman's citation, which Sullivan had received for unsafe movement; and, after a review was made of Sullivan's personnel files.

Hughes and Register have jointly testified, there was further discussion in Hughes' office when Sullivan returned from making a copy, but this was after the disciplinary action was over, and everybody understood that. They had a short safety meeting. They discussed what actions they could take, or what suggestions that Sullivan might have to prevent accidents like this happening in the future to Sullivan, or any other BEMC employee. Hughes recalled they discussed adjustment of the mirrors on the vehicles; and, the proper ways

to back (up). Sullivan made the recommendation of a bumper sticker to put on the back of the truck that asked people to stay a certain distance from the truck.

#### Analysis

An employee has the right to request representation at an interview where the employee reasonably believes an investigation will result in disciplinary action, *NLRB v. J. Weingarten*, 420 U.S. 251, 257 (1974). An employee has no such right to presence of his union representative at a meeting with his Employer being held solely for purpose of the employer informing the employee, and the Employer acting upon a previously made disciplinary decision, even if, as here, offer of explanation is made by Employer, *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

In what appears in ready contrast with Employer's widespread deficient account offered in support of its suspension of Smith, the accounts off Hughes and Register are not only mutually corroborative but appear essentially internally consistent and supportive of the action Employer has taken in this matter. Thus, it seems to be without dispute, and in any event I credit their accounts which establish that prior to any request that Employer received from Sullivan for a representative in this matter, there was: an early report of Sullivan to Register of Sullivan's involvement in an accident on Thursday afternoon, followed by Register's prompt visit and gathering of information on the scene of the accident that afternoon on how the accident had happened, who was injured, what damage was done, and who was responsible, from Sullivan, a citing policeman, and discussion with other involved party, and passengers.

After completing his investigation at the scene of the accident late that afternoon, Register made a timely request of Sullivan on the following day, Friday, for a written statement in Sullivan's own words of how the accident had occurred. Sullivan prepared the statement over the weekend; and, he turned it in to Register on Monday morning before Sullivan made his first request of the Employer that a representative be present with him in any meeting to be held on the matter. Hughes' subsequent review of Sullivan's file was then warrantably made as part of Employer's investigation; and his contact of Personnel Director Demery for that purpose was in order. Hughes contact of Batten under the above circumstances described, informing Batten of Hughes projected issuance of a written warning as discipline, in that proceeding's background, on its face appears candid and prudent, not sinister. The clear weight of credible (if not in the end undisputed) evidence establishes Register had, at Hughes direction, prepared the written warning discipline for Sullivan on Monday afternoon, the day before the questioned meeting was held.

In the light of those determined circumstances, the observed commonalities in the witnesses testimony, but in this instance along with certain instances of inconsistency and disjointedness in Sullivan's diverging account of there being a further investigative interview, when considered along with significant admissions in Rivenbark's account, inclusive of (essentially) an admission that there was an opening statement by Hughes that the reason for the meeting was to discuss the disciplinary action the co-op *was taking* against Sullivan for the accident, thus confirming the basic assertions of Employer's witnesses in that regard, has in the end wholly

convinced me that Hughes' and Register's accounts of this meeting as being with basic purpose for administration of an already determined written discipline for an accident is well established as the more accurate and supported, albeit accompanied with Hughes' offer of any required explanation of the meaning of the discipline being awarded.

Thus, I conclude and find that Hughes announced and read a written warning to Sullivan on which Hughes inquired only whether Sullivan had any questions as to its meaning; and, that other inquiry on the accident occurrence was made clearly thereafter on safety aspects. In short, I find this interview was conducted for the award of a discipline already determined, and not an investigative interview where discipline was possible, or a disciplinary interview where discipline base was being reinforced, and where *Weingarten* principles apply. Accordingly, in agreement with Employer, I shall recommend this allegation of the complaint be dismissed in its entirety.

#### 6. March negotiations, as related to the discharge of Smith

The alleged discriminatory discharge of Smith because of an altercation with Leavitt on May 9, was the most litigated complaint allegation. The second and last meeting that Leavitt missed was on March 9 (Friday) when his father-in-law had open heart surgery. Leavitt recalled the next meeting was in March, but was unsure of the date. Thus Leavitt recalled at a meeting on March 29, or a little earlier, after the parties came in and sat down, Smith stood up and looked over at their table and said, *well, I see you brought all the flunkies with you this time*. Leavitt recalled present for the Company that day, beside himself and Attorneys Smith and Tom Ruff, were: Dimery, Flora Johnson, and (I find) construction supervisors Register and Herring.

Construction Supervisor Register, who attended only one negotiation session, but which was at the same location, and who recalled the same company representatives present (except for Johnson), but not the date, confirmed that he heard Smith say after the management negotiating team came in, "*I see you brought all the flunkies with you today,*" referring to members of Employer's negotiating committee.

Leavitt further relates at this March meeting they started discussing some issues, going over counterproposals; and, while Attorney Smith was trying to talk to Ruff (Union), Smith interjected some loud, boisterous (comments). Leavitt recalled Attorney Smith was trying to get a point across to Ruff at the time; and, it was getting real loud. Leavitt's recollection was that as Attorney Smith was sitting down, Attorney Smith looked at Ruff and said (of Smith), *I can't negotiate with this asshole*; and, Attorney Smith then stuck his fingers in his ears. Leavitt recalled Smith then stood up, and, *as Smith began to come around the side of the table (towards Attorney Smith), Hatcher grabbed Smith by the back of the pants*; and Norris moved his chair so Norris could be in front of Smith; and Ford also jockeyed his chair so Smith couldn't get out.

On cross-examination Hatcher had acknowledged that at a meeting in March Hatcher had had to restrain Smith; and, that *Hatcher had grabbed Smith by the belt when Smith started around the table at Attorney Smith; though Hatcher also testified that it didn't take much to restrain Smith on that occasion*. Hatcher had specific recollection that was the

day that *Attorney Smith had called Smith an asshole at a time when Smith was talking about a wage increase*. Moreover, unlike Leavitt, Hatcher also recalled that on that occasion, *Attorney Smith had come around the corner of his table, had walked straight over to Smith, and said, I'm not negotiating a contract with an asshole like you, Doug Smith*.

Register generally corroborated Smith jumping out of his chair and his movement toward Attorney Smith. Thus, Register recalled after the meeting had been going on for about 20 minutes, Smith jumped out of his chair to come around the table to Attorney Smith; and, others (employees) then moved to block him. Register confirmed Hatcher had reached out and grabbed Smith by the belt loop. However, though recalling there was a statement made to Smith, Register, unlike Leavitt (and I conclude, in this instance, incredibly so) couldn't recall the statement made to Smith, nor even that anything derogatory had been said to Smith in this meeting. I do not find Register's account of this meeting reliable, except to the extent that it is to be confirmed by other credited accounts.

Leavitt has Attorney Smith later get up at time he was signing off on preamble or management-rights clause, or whatever; and as he took it over and presented it to Ruff, Attorney Smith apologized to Ruff; and, the event sort of ended there. In confirming the apology to Ruff, Hatcher had related Ruff pointed back over to Smith; and Attorney Smith apologized for that (but ambiguously to Smith). There is no clear evidence Attorney Smith apologized directly to Smith on this occasion. Even more notably, *Hatcher specifically and firmly denied when the remark was made to Smith, Attorney Smith was seated in his chair and talked to Ruff; or, that Attorney Smith had looked at Ruff and said I cannot negotiate with this asshole. Hatcher reiterated Attorney Smith came around the table*. (Ruff did not testify.)

Presently, I credit Leavitt that prior to May 9 it was not common for management and union officials to make derogatory comments about each other, but only to the following extent. In acknowledging Attorney Smith has called Smith an asshole, Leavitt related (accurately) Smith has returned the compliment, at least in the respect, as found above on Smith acknowledgement that he had said to Attorney Smith at the heated end of the January 4 evening meeting, were you born an asshole, or just work at it. However, I do not credit Leavitt's companion assertion that Attorney Smith's above statement to Smith was the only derogatory management comment that came up in negotiations. E.g., I have credited Hatcher (seemingly) undisputed testimony that Attorney Smith had in that very same heated meeting called Hatcher a "son-of-a-bitch." I do credit Leavitt otherwise that most of the derogatory comments came from the Union side; though I also credit Hatcher that they tried to keep it down.

#### 7. The May 9 heated negotiations; and the Leavitt-Smith altercation

##### a. The negotiation room; attendance; and seating arrangements

Negotiations were held on May 9 in a conference room at the North Carolina Baptist Assembly at Fort Caswell, or Caswell Beach (CB facility). Parking for the CB facility is at a lower level. From lower level parking lot, you proceed up to a double door entry, and thence into a corridor that



leads midway to the right and left. The corridor to the left leads to a set of double doors that enter on a big assembly room; and the corridor on the right leads through a set of double doors, to an area of smaller individual assembly rooms. The assembly room used that day for the negotiations was the first room located on the left on entry through the right corridor doors.

The room used for negotiations was approximately 24 feet by 16 feet wide; and, it was smaller than what the parties had used in the past. (The parties had earlier used the third room, on its right, a much larger *end* room. Leavitt had tried to get that room again for the negotiations, but it was not at that time available.) Entry to the smaller negotiation room is from the hallway through a thirty 6-foot standard door, which is set in the corner of the room, (I find) 13 inches from the right wall, that is perpendicular to hall door wall as you enter, and to opposite parallel porch door wall.

On entering the room there were two abutting tables (i.e., placed end to end) set up to the left at which the union committee was seated on selection by Smith. (All tables described were 6 feet by 2-1/2 feet.) To the right of the Union's table(s) was a passageway from hall door to rest of the room, but first passing between the Union's table and a coffee/cookie table located midway on the right wall. Opposite Union's tables were two similarly abutting tables at which the Company's negotiating team was seated, essentially directly facing the Union's negotiating team, but with adequate walking space between the parties' tables. Behind the Company's tables was a second (two door) doorway that exited to a porch, with beach and water view. There are 200 yards of beach between the water and the porch which extends the back length of the CB facility.

At this meeting there were 10 in attendance on the union side, and 5 on the company side. Besides International Representative Ruff conducting the negotiations and Local Union Business Manager Hatcher there were four (Union) employee negotiators seated at the Union's two tables, and four other employee observers who had some time off, and who were present as they wanted to see how a union contract was negotiated. Employer had five on its negotiating team.

The Union's negotiators as viewed from behind the Union's tables, and facing Employer's negotiators, left to right, were: Ruff, the International representative conducting the negotiations, Hatcher, Norris, Merrill Wilson (an alternate), Smith, and with Billy Ford seated around at the end of the union table located nearest the hall door. Three of four union employee observers identified by Hatcher were seated behind Wilson and Smith, namely, Glen Hayes, Dean Long and Sidney \_\_\_\_\_. (The latter observer appears as Sidney Coleman and Sidney Fuller. For clarity I use Sidney \_\_\_\_\_.) The fourth observer, Teddy Bullard, was seated to the left of Ruff, but more around the end of the union table furthest from the door, and (essentially) facing Ford. As viewed by the Union, and seated left to right for the Company were, Line Foremen Johnson and Batts, an empty chair, Leavitt, Attorney Smith and Line Foreman Coleman.

Though Hatcher didn't remember Smith wearing sunglasses inside the room that day, I find he did. However, I credit Hatcher that he didn't think Smith had worn Army fatigues to negotiations that day; and, that Smith had worn his Army fatigues to negotiations only once. There is no evidence presented, and certainly no convincing evidence of

record that Smith wore his army fatigues to negotiations that day; or, even that on the day indicated that he did wear them, he did so for any reason of intended intimidation. (I note relatedly in passing that at least one negotiation session was at the end of the week, on a Friday.)

#### b. *The heated discussions*

##### (1) In the morning session

Leavitt's recollection is they started this meeting roughly around 10 to 10:30 a.m. The Company had given the union group five counterproposals, including a new wage proposal. (Smith recalled the Union was given the counterproposals only the day before, though Smith asserts the Union was supposed to have received them 8 to 9 days before.) In any event, Ruff requested opportunity to look at the counterproposal documentation the Company had (thus) just given to them; and, the Union said they needed a few minutes to caucus. The Company left the room (shortly), about 10:35 a.m., going out the hall door (down the corridor) into a reception area. There were no union comments made to any company representatives when they went out that morning for the first caucus.

Leavitt recalled that a little after 11 (up) to 11:15 a.m., Ford came out and said they (the Union) were ready, to come on in. On the Company's return, as usual, Ruff asked that Attorney Smith first review the highlights of the Company's counterproposals; and, Attorney Smith started to do so. There was an apparent immediate digression in a discussion of the owner's request that there be no smoking in the conference room.

In a lull immediately following the no smoking discussion, Leavitt recalled Ford had turned to Ruff, and with Wilson echoing it, said ask him (Attorney Smith) about the four tens (four 10-hour days) and (Raleigh) training. According to Leavitt, Ruff at this point looked at us (Employer) and said the four tens and training are a perfect example of the walls and barriers that management keeps putting between the bargaining unit and themselves. Leavitt related that Ruff alluded to the fact that they no longer had four tens, and training had been stopped, or cut. Ruff said why do you continue to do this.

According to Leavitt, at that point Smith said, you're not training these men, you're not giving them safety instruction; you're risking their lives; and, Smith elaborated in some degree. Though Leavitt recalled Smith talking about why they didn't have the four 10-hour days and training and safety, Leavitt acknowledged Smith may have also mentioned something about wages. (Although Smith didn't personally recall a discussion on training, I find there was such discussion. E.g., Norris, in confirming there was a discussion of 10-hour days, in contrast with Smith, also corroborated Hatcher's recollection there was a discussion of the training in Raleigh.)

Hatcher otherwise recalled Smith and Leavitt had had a few words back and forth. With some confusion, Hatcher didn't recall exactly what Smith said, but he recalled Smith was pursuing the issue of the wage package on the occasion when Leavitt first told Smith that Smith was speaking out of ignorance and that Smith was stupid. Hatcher and others clearly recalled as separate instance that as Leavitt was leaving for lunch, Leavitt had reminded Smith one more time

how stupid he was, to be discussed more fully below. presently I note, that Ford (apprentice lineman two, and chief union steward), seemingly corroborated that previously in the morning session, when Smith was talking about wages, Leavitt had called Smith stupid; *and*, that on Leavitt's way out to go to lunch, that Leavitt had again called Smith stupid.

Smith did not recall that (in *this* session) Attorney Smith relatedly put his fingers in his ears. There is no convincing evidence Attorney Smith did so in the morning meeting, though there is credible evidence that such an incident had occurred sometime. (E.g., when Hatcher was asked if Hatcher recalled Attorney Smith had looked over at Hatcher, pretending Attorney Smith didn't hear all that chatter mess and put his fingers in his ears, Hatcher generally confirmed Attorney Smith had looked over at him; and he thought Attorney Smith had made some kind of motion, though Hatcher also related he really did not look at the motion at the time. Similar such activity had occurred in the end of March meeting, above.)

Smith testified cautiously (and, either correctly in reference to morning occurrence, or simply hedged generally, and incorrectly), that he did not quite recall Attorney Smith look at Hatcher, and say, "Mr. Smith please observe the one-person rule;" or, that Smith had *then* said, "I'm talking to somebody else." More precisely, Norris did not recall Smith being warned *that morning* that they couldn't negotiate with everybody talking at once. Norris relate Norris had talked that morning and wasn't warned; indeed, Norris recalled that everybody had talked that morning.

Hatcher confirmed Smith and Wilson and some other employees had started speaking up that morning about the four 10-hour days, and about going to Raleigh for training. Hatcher did not recall that there was a lot of loud talk between Smith, Norris, and Wilson at that time. Neither did Hatcher (or Norris) recall Smith had unusually laughed out loud a lot, or had laughed sarcastically several times as they were trying to negotiate that day (concerning which there is again no convincing evidence advanced that such occurred). However, Hatcher did recall Attorney Smith's reference to Smith's discussion of wages, and the gag rule.

Hatcher recalled an occasion when Smith made a couple of real loud remarks about employee pay rates. Hatcher thought it was at that time that Attorney Smith said you (Smith) need to shut up; and, Smith had turned to Ruff and said, I'm talking to Gene Ruff. Leavitt recounts an occasion that *Attorney Smith looked over at Smith and said who are you talking to: and, Smith replied in a loud voice, he was talking to Ruff*. However, Leavitt recalled Attorney Smith stopped at that moment, and in what Leavitt (candidly) stated he thought was *general statement to everyone said, we are under the one speaker rule and that we all needed to follow that one speaker rule*. Hatcher confirmed Attorney Smith asked everybody to observe the one-spokesman rule, but Hatcher reaffirmed that in fact the Union for its part had never agreed to gagging either side of the committee. Hatcher has recalled that at Ruff's suggestion, Attorney Smith then went hurriedly through the proposals that the Company had given the Union for that morning.

Hatcher's recollection of Ruff then suggesting Attorney Smith go forward with the review indicates there was some degree of confrontation between Attorney Smith and Smith on wages that morning though Leavitt recollection indicates

it had resulted only in Attorney Smith *general* reminder to all of its one speaker rule. I so find. However, I am not persuaded that Attorney Smith told Smith to shut up in the morning session. (Others place similar incident in Attorney Smith direct warning to Smith in the afternoon; and, I find that there was such clear and direct confrontation in the afternoon session, below.) Hatcher recalls the Company then caucused.

Compatible therewith (i.e., a management caucus following the four tens and training subjects), Leavitt recalls the Company's representatives talked about giving a position statement on those two items to explain management's position in those two areas, not to put it in the contract, but to answer the question raised. A provision for four 10-hour days was not in the contract proposal at this time.

Leavitt otherwise explained, that each year there is an evaluation and report; and, if they (seemingly the four tens) would go into effect, they would go into effect at daylight savings time, beginning in April, and end sometime in September. They had previously been in effect; but in prior years they had been put in effect in numerous ways, shapes, and forms. As of May 9, they had not been put into effect for that year. I am persuaded and I find there was no gag rule application or discourse between Attorney Smith and Smith (or any other employees) in regard to the discussion of the topic of four 10-hour days, or training. However, I find there was such discussion by Employer in regard to the parties' initial addressment of the subject of wages that morning, most probably in connection with a first reading of proposed first-class linemen rates and the rate proposed for the warehouse coordinator unit classification, but, in any event (I find) Smith's comment on the wage issues in the morning session was wholly protected.

Leavitt otherwise relates credibly that Attorney Smith had proceeded forward and had started talking to Ruff about the difference in the wage rates of the warehouse coordinator and a first-class lineman. Ruff was looking at the wage sheet with Attorney Smith, and Ruff (after likely Smith comment) said this doesn't seem right. Leavitt recalled that there was then discussion; and, Attorney Smith told Ruff that the warehouse coordinator had been there a long time, or was a long-time employee. Leavitt recalled Ruff then said (in Leavitt's view, leaving the subject), according to this sheet we've got some employees that won't get raises.

Attorney Smith promptly questioned that union assertion, saying in November 1989, management had made a money offer to the Union, which it had rejected; and, somewhere between the end of March and first of April management had made another offer of roughly 2 percent on top of its earlier proposal. Attorney Smith then said he couldn't understand why Ruff now said that there were people out there that wouldn't get any increase, and/or Attorney Smith said he couldn't understand why everybody didn't get some (wage increase). Attorney Smith then asked Ruff, if Ruff could be more specific which employees did not receive the raise.

Ruff answered he wasn't sure exactly who they were, but that he could get (or go) to his notes, and probably get it together (or find out). Attorney Smith asked if Ruff wanted to caucus to get the information together. Ruff said yes. Leavitt recalls the Company got up and began to leave the room; and, it was before 12 noon, maybe 11:45 a.m.

Smith recounts as the company negotiators were leaving the room, *Smith spoke to the working (line) foremen, that they could see what the Company was doing to us or these fellows: they (foremen) knew they're (linemen are) worth more money, or more than that; and, Smith recalled Leavitt responded, "You're just trying to put a wall up between us."* Smith also recounts that Leavitt said, Smith was speaking in ignorance out of both ends.

Leavitt's version further confirmed Smith only in that as management's committee was leaving the room, Smith said, *management's pretty sorry, they won't even let their negotiators talk; and, Leavitt had responded to Smith, not angrily, but straightforward, why do you keep putting walls and barriers between us every time we act together and negotiate; and, that Smith replied, "I know what I'm talking about."* However, both Smith and Leavitt accounts indicate there was more to the conversation, and such is established from the recollections of others. Norris had (I find) generally compatible recollection (though placing it when they broke for lunch), that *Smith had held up the wage schedule and said to Coleman and the other foremen, you know that they're doing your both wrong; and, that Leavitt then said, Smith was blowing off a lot of hot air; and, that Smith was ignorant and stupid.*

It is warranted relatedly to note that variance in the several witnesses' accounts as to whether this discourse between Smith and Leavitt occurred as management was leaving on a caucus or for lunch appears to be accounted for in the main because the stated caucus was extended into lunch hour before the parties returned to bargaining; and thus witnesses would have understandably (if confusedly when viewed overall) variously recalled and described departure remarks to either a caucus or lunch break. In any event, *Leavitt has acceded he had told Smith that Smith was ignorant in this morning meeting, though, in contrast with Hatcher, Ford, and others, Leavitt asserted he did so only once.*

Teddy Ray Bullard is employed as an electronic technician at BEMC's Whiteville district. (Bullard was initially employed in advertising for the Company, where he had won awards; and, the General Counsel would have Bullard's credibility especially enhanced on that account and on the basis of Bullard's testimony that he enjoys working at the Company; and, Bullard's seemingly uncontroverted assertion that he has a good relationship with all the people there.) Bullard has essentially corroborated Norris, in that Bullard recalled that after they had adjourned for dinner at the end of the morning session so that they could caucus on the Company's wage proposals, as the company team was preparing to leave for dinner *Smith spoke collectively to everyone in the room, expressing his dissatisfaction with the Company's wage proposals. Bullard confirmed Leavitt started throwing some remarks at Doug, such as that Smith was just blowing it out: that he blows it out all the time: and that he was just speaking out of ignorance.*

Hatcher has only the more congruously then further recalled Smith had also said to Leavitt, *"That's why nobody likes you, because you're always making remarks."* Indeed, though Leavitt said only that Smith had then fired something back at Leavitt that Leavitt initially didn't exactly recall, Leavitt has as much as confirmed the same, in that Leavitt later recalled *Smith had said the men with Leavitt and employees at this Company hate you.* I credit Hatcher's recol-

lection that Smith told Leavitt that nobody liked Leavitt because of his remarks. Norris confirmed Smith that Leavitt had continued to speak as he went down the hallway, but neither could hear what was then being said. In that regard, I find it also likely, and I credit Leavitt that *Leavitt had then told Smith, why don't you put a sock in it,* as Leavitt walked out of the room.

As the Union was not yet ready at a company 12:30 p.m. check, the parties broke for lunch. After about an hour, the Union notified the Company they were ready to start. The Company returned to the room between 1:30 to 1:45 p.m.; and shortly thereafter the parties reconvened. Smith had recalled that the meeting reconvened about 1:35 to 1:40 p.m.; and Leavitt recalled they did at 1:45 p.m.

## (2) In the afternoon session

During lunch the union committee had discussed all the Company's counterproposals that the Company had recently given them. They came to agreement on several of the articles, but the wage package was up in the air. After the parties reconvened, Attorney Smith asked Ruff if he had looked over the wage package, and if anything could be done. Ruff said the Union had come to an agreement on possibly one or two proposals, and, with cosmetic changes there could be a probable agreement on a couple of others.

Leavitt recalled there was some preliminary discussion, but as they got seated and began to discuss (wage) issues again, Ruff said, I really can't pinpoint those people that don't get salary increases. Ruff said he didn't have the information, or it wasn't available. Ruff then asked will you get me a current list of those specific salaries of bargaining unit employees that would apply to the wage increases. The Company agreed to do so.

Leavitt didn't perceive Union's inquiry at this time was about certain increases that were based on evaluations that employees may or may not have received since the last list they had received. Individual wages for employees through the end of 1989 had apparently been raised by evaluations at different times in the year for individual employees. Leavitt recalled the point of the red circling discussion that then developed was to identify employee earnings in relationship to the salary proposal. Leavitt's perception of the discussion was not that Ruff was trying to identify all the people who were at the top of the salary range, including those who may have received evaluations since his last list, but rather, Ruff wanted a current list of where everybody stood. It is clear enough and I find Ruff's request was made to reasonably determine how all the unit employees would be affected by BEMC's most recently submitted wage proposal.

According to Leavitt, at this point Attorney Smith and Ruff took up discussion of the mechanics of wage and salary administration, how to get it administered. There was some discussion of red circling salaries. Leavitt recalled that they discussed that (some) employees were too high, and (some) too low. Smith (and Norris) confirmed that as the meeting progressed Attorney Smith and Ruff were both talking about wage rates; and, how they were going to close the gap between the lowest and highest paid serviceman and come to an agreement on one rate. Attorney Smith said the only way he knew to do it was to red circle some people.

Leavitt's recollection was that when the discussion of wage administration (red circling) had thus come up, *Smith*

*in a loud voice had said if you'll quit spending money on industrial centers, you can pay these men a fair wage.* (On cross-examination, Leavitt related *Smith said if we (BEMC) would stop putting money in the industrial centers, the Company would have money enough to pay more wages to employees.*) Leavitt recalled that at that time Attorney Smith looked at Smith and said, *Doug. You know the one speaker rule, this is a warning.*

Despite Hatcher (and Norris) apparent nonrecall of an industrial center discussion at this meeting, on cross-examination, *Smith acceded that Smith had said something like if the Company can spend all this money on these business industrial centers, they can pay these men more money, though not word for word.*

In regard to industrial centers, Leavitt explained (generally) that BEMC had applied for and been awarded significant amounts of grant money to be able to put together a business incubator project. Leavitt relates all of this is funded by noninterest bearing loans, or specific grants. The newspapers had publicized that they have three, and were working on a fourth. In contrast, Smith testified that he did not believe the business industrial centers are generated by government grant money *only*. It was Smith's understanding from having read the newspapers that the co-op was going to spend its own funds on business incubator centers; and, there was thus money from both involved. Be the actual total funding source as it may, it is clear and I find (again) Smith was talking at the time about a protected subject of wages.

Leavitt did not definitively testify that Leavitt had said that Smith was speaking out of ignorance and stupidity in regard to the statement that Smith made about the industrial centers. Hatcher did not recall Leavitt saying anything about Smith being ignorant in making a statement about the industrial centers. Even more notably, Smith has (candidly) denied that Leavitt did. In light of that Smith denial, and Hatcher confirming nonrecollection of same, any indication in the evidence to the contrary is wholly unpersuasive that Leavitt on that account and occasion had called Smith ignorant. However, I do credit Hatcher's recollection of Leavitt saying Smith was speaking out of ignorance and/or stupidity when Smith was talking about (i.e., against) the Company's offered wage packet.

Leavitt (candidly) acknowledged that he thought Smith was not informed about the background on the industrial centers, but asserts it wasn't Smith's uninformed comments thereon that Leavitt had thought were disruptive. Rather, what Leavitt asserts he felt was disruptive was that at this time (as Leavitt viewed it), both Attorney Smith and Ruff were in the middle of a very intricate discussion about the mechanics of the Company's wage and salary proposal which was a very difficult issue. Leavitt's stated view of the critical nature of the discussions on the wage administration and red circling at this time of the negotiation meeting was based on a (seemingly) uncontroverted assertion that both Ruff (and Hatcher) and Attorney Smith had also spoken about how difficult it would be to get those things (high and low individual rates in classifications) together. Leavitt asserts (and thus not without foundation, at least from his own vantage point) that he thought that it was disruptive that Smith had made a statement about BEMC spending money on industrial centers in the middle of that difficult discussion.

According to Leavitt, Attorney Smith and Ruff went back to the discussion about the mechanics of wage administration. The red circle situation came up again. There was some question of the servicemen, one (getting) this, and one that; and, they were working over the mechanics of it. Leavitt recalled *at that time Smith said you need to pay these men a fair wage. Attorney Smith looked at Smith and said that's enough. Don't speak out anymore. We're not going to listen to it. Leavitt has Smith respond, you are going to listen to it. I've got something to say and you're going to listen to it. According to Leavitt, at that point Attorney Smith closed his books, and said we're out of here.*

Leavitt has asserted Smith wasn't complaining about how unfair management was to the workers, but how the wage rate wasn't right, and we (the Company) were going to listen to them about the wage rates. In that regard, Smith's recollection is generally compatible, namely, that *Smith had said that the men were worth more money than the Company was offering* (as clearly a protected employee position on wages). Smith confirms *Attorney Smith then told Smith that was Smith's first warning* (referring to the gag rule the Company had sought to impose on the Union's committee). Smith's abbreviated initial recollection (I find no more complete than Leavitt's was), is, Smith said, "Britton you know these men are worth more money." Smith believed Attorney Smith then said, "We're out of here."

Hatcher confirmed Ruff and Attorney Smith were talking at the time about the serviceman pay rates and red circling; and (I find) Smith again related his general dissatisfaction with the wage scale that the Company was offering. (I have here credited Bullard's recollection to that effect rather than Hatcher's that Smith had again commented about the warehousemen being paid more than the journeymen wiremen.) However, I do otherwise credit Hatcher's corroborated recollection that on this occasion Smith had *first* asked Ruff below, if he could speak and Ruff had said yes, go ahead and speak; and, that Smith had then made the point that the wage package was unfair to the employees. Smith said, "*The Company can afford to pay the men more than this.* Hatcher recalled Attorney Smith (and I find first) then said, "*And you can shut up, Doug.*"

Though Norris related Attorney Smith warned Smith only once that afternoon, Norris recalled when Smith said to Ruff, "I would like to speak," Attorney Smith had (I find, preliminarily) said, "*We're not going to have no outburst. And if so, we're leaving.*" Contrary to a Smith apparent nonrecollection (at least on one occasion, though see Smith account below for an indicated more congruous affirmance in other context), Bullard has (essentially) confirmed Norris that Attorney Smith then told Smith if he didn't shut up they were going to leave. Ford (essentially) confirmed both that *Attorney Smith told Smith he was out of order, and if he continued to be out of order that they would leave.*

In summary, I credit Smith that while Attorney Smith and Ruff were discussing certain wage issues, after asking for and receiving Ruff's permission to speak Smith told Attorney Smith (essentially) that a wage package was what it was all about, and nothing had been changed in the wage package; that Employer's present wage offer was unfair to the men; that it was not sufficient; and, the Company could afford to pay the men more. I credit essentially mutually consistent and corroborative accounts of Norris, Ford, and Bullard that

Attorney Smith at that point told Smith to shut up, and warned Smith if Smith did not stop talking, Employer's team would leave. I credit Hatcher's (and Norris') corroboration of Smith's reply that he wouldn't shut up; he had been given permission to speak; and he would speak his mind. (Norris confirmed Smith had said he was going to speak his mind.)

Thus I credit Hatcher's (essential) corroboration of Smith in a Smith continued reply, "*No, I won't shut up. This is what it's all about, is an increase for all the employees out there.*" Attorney Smith then told Smith, *if you speak anymore out of turn (or interrupt), we're out of here. Smith then said, "If that is what it takes for you to leave, then I suggest you go ahead and leave."* (Bullard has perhaps more cogently recalled Smith said, *if that's what you want to do, then, go ahead and leave.*) With that (I find), *Attorney Smith shut his papers up, and said, were out of here.* Attorney Smith then commenced to pick up all his papers, and put them in his file.

With his wage proposal copy in hand, Smith came around his table, and came directly in front of Attorney Smith at management's table, saying, "*Britton, you know these men are worth more than this. It's ridiculous you offering a first-class lineman eleven dollars and three cents an hour. But down here you're offering the Warehouse coordinator three dollars more an hour. The reasoning behind that is that he's spied against us and run us down the whole time.*"

Smith's stated reasoning for the compared warehouse coordinator's rate, as a statement made (as opposed to opinion held) by Smith at the time, appears to be uncorroborated by any other witness. Nor is it even adequately supported as likely said by other evidence. Thus, I do not credit it as a statement likely then made by Smith, though I do not discount a likelihood of it then being a viewpoint held by Smith. Relatedly, Norris has confirmed only that Smith was pointing out why could they pay a warehouseman more than a first-class lineman. Ford confirmed even more generally Smith asked, why can't you all pay more money. In light of what the fair import of such a specific assertion of underlying reasoning for Smith's continued questioning of the two rates, if not in the inherent likelihood of its eliciting some employer response, it seems to me that some other witness (at least some of whom were linemen) would have confirmed that Smith had stated that reasoning in putting the question of the comparison to Attorney Smith, if Smith had expressed it so at that time. To extent Smith testimony would indicate he had then made that statement of reasoning, I do not credit it.

It is undisputed that as Smith came over, Smith had the wage proposals in his hand. According to Leavitt, *Smith started waving it in Attorney Smith's face, in addressing Attorney Smith and Leavitt in front of their table.* Employer would draw support from close observance of General Counsel's witnesses in the matter of Smith waving the wage proposal in Smith's face, though not pressing direct inquiry thereon, and while seemingly able to draw little support from its own witnesses in that area.

In any event, Smith categorically and credibly denies that he was waving the wage proposal in Attorney Smith's face, or at all; and, while admitting he was in front of Attorney Smith, denies that he was in front of Attorney Smith's face, relating there was a table between them, and indeed recalling

Attorney Smith was even then backed away about 3' from the table, in the act of getting his stuff ready (to leave).

Bullard had no recollection of Smith waving the paper in Smith's hand. Company witness Batts recalled Smith came around the table, with the wage proposal in his hand; approached management's table; and, *first engaged Attorney Smith in discussion about the men needing better pay.* Though Supervisor Coleman initially had asserted he felt like Smith was talking to both (Attorney Smith and Leavitt), Coleman conceded, he'd have to say Leavitt spoke up first (to Smith). Though I do not credit Leavitt's account of Smith waving the Employer's wage proposal in Attorney Smith's face, I find it likely Smith pointed to the rates on the paper to Attorney Smith when making the comparison.

Thus, I credit Smith (and I find) that after Smith approached management's table, Smith first spoke to Attorney Smith about wages; and, in doing so, Smith did not wave the Company's wage proposals provocatively in Attorney Smith's face; nor did Smith otherwise get in Attorney Smith's face; and, it was Leavitt who on his own at that time broke into (interrupted) Smith's conversation with Attorney Smith on wages. I find that at this point Smith clearly still occupied a protected status in discussing wages, and one that was not lost because Attorney Smith had declared Employer's participation ended because Smith would not comport with Employer's unilaterally imposed gag rule.

### (3) The first heated Leavitt-Smith verbal confrontation

Hatcher has testified (I find credibly, at least to this extent) that he made no effort at that point to get up and get Smith back, as there was no need to. Ford's recollection was Leavitt had then said, *why don't you shut up, I'm tired of hearing you.* Hatcher's related recollection was that Smith pointed at the wage package, looked down at Coleman, and then the other foremen, and said, "*This is what it's all about, boys. See what they're trying to do to us? See what they're trying to do to you all? We've got people over there that can't afford to leave [sic] in decent places.*" Hatcher relates (and others essentially confirm) that Leavitt in this conversation then said (at least) a second time that day, "*Doug, you're speaking out of stupidity. You don't know what you're talking about.*"

Smith backed over to Leavitt, who was still sitting. (Although Smith has related he approached Leavitt's table, I find it was more a matter of backing up but a step, or stepping to the side. Though Leavitt was sitting kiddycorner or straddling both tables, Leavitt was still more at the same table as Attorney Smith, who was in the middle. Thus, I find Smith backed over as Hatcher recalled.) Consistent with interim statement by Leavitt of Smith's stupidity or ignorance on the wage issue, Smith has related Smith then said, "*You think I'm ignorant. Behind me, pointing to Sidney (\_\_\_), is a man that has been here twenty-one years.*" Smith said "*That for the last year and a half he has struggled to build on to his home, but you, on the other hand, have been here nine years and you've got beach property and nice cars and nice trucks.*" Smith then said, something is wrong, or (as Smith has stated he believed he said at the time) *crooked here.*

On cross-examination Smith acknowledged he didn't know for a fact that Leavitt owned any beach property, then relating a contract(or) had told Smith that they had built a place

for him. (Smith didn't know if it was actually Leavitt's father-in-law's house.) Ford has (essentially) corroborated Smith spoke in that manner, in that Ford related that Smith had turned and said to Leavitt, you've been here for seven or eight years and living nice and this man, pointing to Sydney \_\_\_\_, has been here for 20 some years and can't even hardly afford to remodel his house. (Even the more significantly Ford recalled Leavitt had then rose from his chair, and with his finger in Smith's face, told Smith to shut the hell up, below.) Supervisor Coleman recalled if not exactly the same, in summary, fairly compatibly, *Smith told Leavitt they were cheating the men*; they ought to pay the men; and, Leavitt talked back to Smith at the same time.

In sharp (and a remarkable) contrast, Leavitt not only denied putting his finger in Smith's face, Leavitt has asserted that he didn't remember Smith at any point along here talk about any other employees' economic standing as compared to Leavitt's. Indeed, Leavitt has specifically asserted he didn't remember the Sidney \_\_\_\_ situation and a few others (but Leavitt has not categorically denied the same). Presently I note that such nonrecollections simply strain credulity as being too convenient. Leavitt otherwise asserts the main issue that he remembers (Smith say) was they need to be paid a fair wage, and we were going to listen to Smith about paying them that fair wage; that Smith said this was the issue; and said, the Company was treating these men unfair. Though it is clear Smith had made all such statements, I presently also credit Smith's above account that at *this* time in the developing heated discussion between Leavitt and Smith, one initiated by Leavitt's intemperate interruptive remark and insult, Smith compared Leavitt's perceived economic status with that of unit employee and attending observer Sidney \_\_\_\_; and in doing so Smith said something is wrong, or crooked here, to which Leavitt took immediate and heated affront.

(a) *The conflict in assessing provocation*

Smith denied he was leaning into or over the table to Leavitt, though doing so somewhat in talking to Leavitt who was then seated would appear likely. In any event, Smith's version is Leavitt had then leaned (towards Smith) and stuck his finger in, and about 8 inches to 10 inches from Smith's face, saying something that Smith was unsure of, but with Smith recalling he (immediately) told Leavitt "*Get your finger out of my face. Chip Leavitt.*" Smith denies he then moved the table to gain access to Leavitt. Smith relates Leavitt had first also said, "*I'll stick my finger in anybody's face I want,*" or something to that effect; and, *it was then that Smith moved the table, saying something like, "Well you're not going to stick it in mine."*

Leavitt's version is not so cohesive. Leavitt related Smith kept pointing the wage proposal at them, and said, that they were going to listen to what Smith had to say, and, they hadn't listened before. Leavitt then told Smith, *Smith had made threats and accusations, called names, and Smith had continually disrupted the meetings; and, Leavitt asked Smith, how could we negotiate under this situation.* Leavitt asserts *this upset Smith a great deal.* Leavitt has further asserted (albeit somewhat disjointedly) that it so greatly bothered him that *Smith came in front of the table and Leavitt and said, you know, you're not as tough as you think you are; and,*

*Leavitt retorted in kind, saying, you're not as tough as you think you are.*

According to Leavitt, it was at this point Smith grabbed the end of the table and moved the table to his (Smith's) left away. *Leavitt relates Smith then came right in Leavitt's face; and, on other occasion, that Smith walked up to Leavitt nose-to-nose, though acknowledging there were no punches thrown.* Leavitt would have been necessarily already standing at that time. Leavitt relates they repeated the same statements to each other, namely, Smith you're not as tough as you think you are, and Leavitt retort, you're not as tough as you think you are; and, they stood there for a brief moment, or period.

Smith has *denied* that he said to Leavitt, "You're not as tough as you think you are." However, Smith has acknowledged that there were some things said between them, that Smith did not recall. Smith denied that they were then 4 inch apart, but acknowledged that he (Smith) had taken a half step (forward), but also that Leavitt also came, or moved closer to Smith. (Not credited is Smith's recollection of Leavitt then rising. Clear weight of other credited accounts is that Leavitt was already standing.) Smith recalls Attorney Smith then came down the table; and he shuffled Leavitt back out the rear doorway onto the porch, and away some.

Leavitt initially stated he thought it was just chatter between them. On cross-examination, though Leavitt continued to assert he was not upset at that time, Leavitt then conceded their voices were continuously rising. Indeed, on further cross-examination, Leavitt also acknowledged that they were not just standing face-to-face trading statements of you're not as tough as you think you are, like kids. They weren't smiling, and they weren't happy about it; they were at a stand-point (sic) looking at each other.

Leavitt relates Attorney Smith put his hand on Leavitt's arm, and said come on, Chip; and, Leavitt remembered distinctly that Charlie Batts also said it's not worth it. So, Leavitt walked out the double doors directly behind him. Leavitt thought Batts was alluding to the fact the physical confrontation would (sic, but in context, wouldn't) do anything for anybody. Leavitt's stated view was Batts felt he had to tell Leavitt that Leavitt shouldn't have a physical confrontation because Smith had advanced on Leavitt, pulled the table out, and advanced in his face. With that Leavitt walked out the door.

In contrast with Leavitt assertion he was not angry, Supervisor Batts has confirmed that both Attorney Smith and Batts had started talking and got Leavitt *settled down*, and got him on the porch; and Supervisor Coleman confirmed Attorney Smith and Batts got Leavitt *calmed down enough* that they eased Leavitt out on the porch back there. Though Leavitt on cross-examination continued to assert Batts' statement was not made because Leavitt was very angry, Leavitt has otherwise as much as acknowledged he was very angry, in that Leavitt relates they basically stood out there on the porch for a few (3 to 5) minutes to clear our heads; discussing really nothing out there, just taking a breather, and, trying to allow things to cool off. Then Leavitt decided to leave as the negotiations were finished.

Leavitt has denied that whenever Smith spoke about the wages, that was a condition that Leavitt could not abide. Leavitt also denied he had a problem with a mere employee complaining to him or management about wages. Leavitt re-

lates they were having an equal discussion, which Leavitt states he thought was the point of negotiations; and, Leavitt acknowledged that Smith had as much right to Smith's opinion as Leavitt would have to his own; and, the fact that the cooperative wanted one type of wage plan, and the Union wanted another, Leavitt asserted was what negotiations are about. (Hatcher relatedly recalled *Smith said, the Company had mentioned red-circling for a catch-up, and didn't want to give them a raise at all (below); but they (employees) were looking for an across-the-board increase.*)

On cross-examination, Leavitt stated he believed Smith had been disruptive in negotiations. Leavitt related during the negotiations Smith had constantly more than complained about management officials, Leavitt repeated, *Smith had made accusations, and threats about their job security.* Though Leavitt had given prominence to Smith statements in this meeting that management was unfair in dealing with the wage proposal, Leavitt related it was his view Smith hadn't focused on wages (only), *Smith had talked on corruption; and, talked on other different issues during negotiation sessions.* There is generalized support in even Leavitt's account that Leavitt had perceived Smith had *accused* Leavitt of *corruption* in making the economic comparison of Leavitt with Sidney \_\_\_\_\_ and then saying that there is something wrong or crooked here, but not only with Leavitt, below.

(b) *Other considerations of corroboration*

Hatcher confirmed Smith had backed over to Leavitt, and, that Smith was in front of Leavitt. Hatcher corroborated Leavitt stood up; and Leavitt leaned across the table and put his finger in, and 2 to 3 inches from Smith's face. Hatcher also corroborated Smith said, don't stick your finger in my face. Indeed, Hatcher has Leavitt answer even more provocatively, "I'll stick my finger in anybody's face I want to. What are you going to do about it?" (The latter statement attributed to Leavitt of what are you going to do about it, though it would appear consistent with later Leavitt ascribed Smith statement made to Leavitt, you are not as tough as you think you are, appears not corroborated by any other witness.)

Hatcher relates otherwise, that's when he saw the table either shoved by Leavitt, or (as Hatcher had earlier recorded in affidavit, and I find) pulled back by Smith. Hatcher related, Smith didn't pull the table out far enough for any one to go between; that he didn't see them get nose-to-nose; and, that it didn't appear to Hatcher to be an opening that anybody could get in between, or get to each other, as the tables were (still) close. Hatcher recalls Attorney Smith then said to Leavitt, while grabbing him by the arm, "Come on, let's go outside. Get outside, out, out." Hatcher recalled Smith then talking to the foremen, said this is what it's all about boys; and, see what they're trying to do to us; and they don't want to give us any increase at all. They (Company) had mentioned red-circling for a catch-up, but we (Union) are looking for an across the board increase.

Norris, though (erroneously) recalling it as after Leavitt had told Smith that he was just blowing off a lot of hot air, has otherwise corroborated that *Leavitt had stuck his finger in Smith's face; and, that Smith told Leavitt to get his finger out of Smith's face.* Norris (as compared with Hatcher), corroborates that *Leavitt (only) told Smith that Leavitt would stick his finger in anybody's face he wanted.* Norris other-

wise corroborated Smith, that when Leavitt was leaning across the table and had his finger in Smith's face, *that was when the tables came apart.* Bullard confirmed Leavitt pointed his finger in Smith's face. Ford recalled Leavitt rose from his chair and told Smith to shut the hell up; and, while standing, Leavitt pointed his finger in Smith's face. Ford also confirmed that Smith said, "Get your finger out of my face."

Preliminary Analysis of Leavitt and Smith Mutual Provocations

Question of credit of finger pointing momentarily aside, effectively, four witnesses of the General Counsel have, if variously, no less substantially corroborated Smith, not only that Leavitt had stuck his finger in Smith's face, but that when Smith told Leavitt to get Leavitt's finger out of Smith's face, Leavitt had (even more provocatively) responded he would stick his finger in any body's face he wanted; and, that that was when the table (more in front of others, than Leavitt) was pulled back by Smith. Though I am not persuaded and do not credit Hatcher's recollection that on this occasion Leavitt actually said what are you going to do about it, I am constrained to observe that would appear as but fair import of the above statement attributed to Leavitt *that Leavitt would stick his finger in any body's face he wanted*, if credited (as it is for the reasons set forth below); and, thus likely to itself have elicited an indicated further heated Smith response, whether it was *well you're not going to stick it in mine*, or, as plausibly that *Leavitt was not as tough as he thought he was.*

Presently, I have no doubt and I find that an increasingly heated exchange had occurred between Smith and Leavitt, in which both had become increasingly angered with one another, and had traded insults. Insofar as prior provocation of Leavitt is advanced, I find prior Smith statements had explicitly compared Sidney \_\_\_\_\_ and Leavitt (perceived) economic conditions, coupled with the (credited) Smith assertion something is wrong or crooked, unquestionably had immediate significant impact in further angering Leavitt, who was disturbed, as Leavitt viewed it, over Smith's unproductive interruptions in the negotiations, that had again lead to Attorney Smith's enforcement of Employer's gag rule.

Whether the Sidney \_\_\_\_\_ and Leavitt economic comparison, as coupled with Smith's statement something is wrong or crooked here, reasonably caused Leavitt (or Coleman) to then view Smith's statements as unfounded accusation of some corruption (or of cheating the men) at the time, either of which would appear as possible inference for Leavitt (or Coleman) to draw therefrom, an additional underlying circumstance thereof is no less clear and inescapable. It is that it was Leavitt's own prior demeaning interruption and intervening insulting statement about Smith's ignorance while Smith was (as I find) lawfully pressing with Attorney Smith the employees' position of an inadequate company wage offer that had in turn then lead directly to Smith's related economic comparison of Leavitt and a unit employee and, to Smith's related statement that included the insulting and accusatory remark something was wrong or crooked here.

In contrast with the broad based corroboration of Smith that Leavitt had stuck his finger in Smith's face, and, the heated discourse and confrontation that followed, company witness Batts testified (only) that he did not at any time see Leavitt raise his hand or his finger in Smith's face. Super-

visor Johnson stated (generally) at the time Smith walked up and they passed words, supervisor Johnson didn't see Leavitt make any motion with his hands at all. Coleman had also related he didn't see Leavitt stick his finger in Smith's face at any time along there, though Coleman, who had initially asserted he was looking right down the table at them and didn't see any Leavitt hand movement, later admitted he did not see Leavitt's hands at all. However, no company witness appears to address, let alone convincingly deny, the evidenced Smith-Leavitt dialogue on the very subject of finger pointing. In any event, I credit the well corroborated account of General Counsel's witness Smith that there was such verbal discourse on the occasion of Leavitt's pointing his finger in Smith's face, as has been set forth above.

However, with regard (otherwise) to Leavitt attributed statement by Smith as made to Leavitt that you aren't as tough as you think you are, the weight of evidence would appear supportive thereof. *Coleman corroborated Leavitt Smith told Leavitt, you aren't as tough as what you think you are; and Leavitt then told Smith. "You're not as tough as what you think you are either."* (Coleman recalled about that time Smith pulled the table apart; and, Smith got sort of in between the two tables right up at Leavitt, and they argued back and forth.)

Company witness Batts also (but only) recalled of the Leavitt-Smith initial verbal confrontation, when Smith went up to Leavitt and started talking to him, Smith said *something like you're not as tough as you think you are; and, Leavitt said something of the same order back*. Batts much less credibly asserted he couldn't say if there was *anything* said between the time when Smith had said, "these men need better pay," when talking to Attorney Smith, and when Smith said to Leavitt "you're not as tough as you think you are," rendering Batts reliability in additionally recounting Smith *then* pulled the table apart and got right into Leavitt's face, appear more selective, and questionable.

Though Johnson relates (at least generally) they passed words, the only thing Johnson (also) remembered was he thought Smith told Leavitt that Leavitt wasn't as tough as he thought he was; that Leavitt told Smith "you're not as tough as you think you are either;" and, that Smith had then pulled back the table at which Batts and Johnson were seated. Johnson confirms Batts told Leavitt to come on out, it wasn't worth it; Attorney Smith and Coleman told Leavitt the same thing; and, Attorney Smith, Leavitt, Johnson, and Batts then stepped out on the porch.

Neither Ford's (or Bullard's) accounts (direct or more significantly in rebuttal) appear to address the matter of further Smith and Leavitt cross statements specifically on not being as tough as you think you are. Nor did any of General Counsel's witnesses otherwise adequately support Smith's denial of such statements, which Smith, in my view, had less firmly or convincingly ruled out. Thus, on the weight of what appears to me as the more credible evidence, in this instance, I credit Leavitt's corroborated account that, then (but only after, as I have found above, and in response to Smith statement "Get your finger out of my face, Chip Leavitt,") and Leavitt's own response that *he would stick his finger in anybody's face he wanted*, I find Smith then had *more likely* said, in reply, *you know, you're not as tough as you think you are; and Leavitt retorted, you're not as tough as you think you are, either*.

Smith testified credibly that this first confrontation was verbal only. Bullard corroborated there was no physical encounter. Norris confirmed Attorney Smith (promptly) got Leavitt back outside. Though Norris related this is not when they got nose-to-nose, there is no question the verbal confrontation had progressed to a point just short of physical encounter. Bullard confirmed when Leavitt stood up, the two were standing almost nose-to-nose, until some of the men separated them. However, it is also clear and I find that both Smith and Leavitt, though caught up in a heated verbal exchange, each had enough control left not to physically engage each other. Individual personal restraint, and cooler heads had prevailed, this time.

In the above circumstances then, in my view it makes no difference whether Smith moved the table after Leavitt statement he would stick his finger in anybody's face he wanted, as Smith and others credibly recalled, or after Smith's initial statement, *you know, you're not as tough as you think you are; and, Leavitt retort in kind*, as Leavitt and others credibly recalled. The fact is both were caught up in developed heated exchange, in which both had insulted each other; in which both were physically at fault; but in which neither had made actual physical contact.

Thus, weight of credible evidence has convinced me (and I find) that after being intemperately interrupted in a lawful conversation with Attorney Smith, and then again called stupid or ignorant by Leavitt, in then comparing unit employee and observer Sidney \_\_\_\_\_ to Leavitt's (perceived) personal economic standing, Smith had additionally said something is wrong and/or crooked here, which Leavitt reasonably took as being personally accusatory, and which had in turn angered Leavitt to the point (as Ford credibly recounts) Leavitt then rose telling Smith to shut up, if not the hell up. However, on clear weight of the more consistent and mutually corroborative evidence, I further find in rising and telling Smith to shut up, Leavitt raised his hand and pointed his finger in direction of and in sufficient proximity to Smith's face for Smith (and others) to conclude it was being pointed in Smith's face; and, to which additional affront Smith registered an immediate verbal response to remove the affronting physical gesture, as Smith has credibly related, with substantial corroboration by Hatcher, Norris, Bullard, and Ford, and with essentially unconvincing denial by Leavitt and other company witnesses.

Moreover, I further find that when Smith told Leavitt to get his finger out of Smith's face, Leavitt even more provocatively responded he would stick his finger in anybody's face he wanted. In those circumstances I find that whether Smith parted the tables (immediately) thereafter and then took a half step towards Leavitt which Leavitt matched, or did so only (immediately) after Smith had said, *you know, you're not as tough as you think you are*, and Leavitt had retorted, *and you're not as tough as you think you are, either*, it is clear to me in either event that each was alternatively insulting and provoking each other, but that this first incident *had* started with Leavitt's initial upset view of Smith's lawful press of alternative employee wage position with Attorney Smith, that resulted in an increasingly heated oral exchange of insults and physically affronting gestures that developed out of the wage discussion, but ended with no physical encounter engaged in by either Leavitt or Smith.



(c) *The subsequent Smith-Coleman conversation*

When Leavitt went out to the back porch with Attorney Smith, Smith moved to his side of the table (below). Smith recounts he said to Coleman, who remained in the room, *you might as well get your stuff and get out*, or, possibly, *get the hell out of here*. Coleman recalled, and Johnson standing by the porch doorway confirmed, Smith looked at Coleman and said, “Reno, you all need to get your alls mess and get out of here.” Coleman said, “Doug, that’s what we are going to do.” Though Coleman could tell Smith was hot, Coleman didn’t believe Smith was angry at him; and he did not take that as a personal threat to him.

Bullard related he had looked out on the porch and saw Attorney Smith pointing toward the end of the building as if to advise or direct Leavitt to leave that way. The parties had used the end unit for negotiations before. Having initially related that the porch didn’t lead to the ground that he knew of, Leavitt has seemingly later inconsistently asserted it was the prior evening before giving hearing testimony, on a visit to that location, that Hughes had brought to his attention for the first time, that you could exit from the porch off that end of the porch walkway. Be that as it may, and contrary to General Counsel’s reliance thereon and on an argument that the need for the cooling off period on the porch supported Attorney Smith’s direction to Leavitt to leave that way, the evidence presented is unconvincing: that Attorney Smith actually directed Leavitt to leave by porch exit; that Leavitt had on his own elected not to do so; or, that Leavitt had viable options of leaving through other (occupied) rooms. Nor, more importantly in my view, did Leavitt have obligation or need to leave by the porchway. However, neither am I persuaded Smith had in the interim taken up strategic position in anticipation of a further confrontation with Leavitt, as is seemed urged by Respondent.

Smith confirmed union people told Smith to come back to their side of the room. Thus, Norris recalled Hatcher or Ruff (though acknowledging neither had left their side of the table) said, “Doug, just move back on our side of the room.” Hatcher however asserted he didn’t see that it was necessary for Ruff or himself at this time to get up and go over there and talk to Smith nor did he see where it was necessary for Attorney Smith to chastise Leavitt for anything. Hatcher’s view was they (Leavitt and Smith) were having a verbal conversation; that there often are verbal confrontations on both sides; and, some of them get a little bit boisterous. Thus, Hatcher didn’t figure that he had to then go over there and pull Smith back, or even that Attorney Smith had to pull Leavitt back, because, as Hatcher viewed it, they haven’t [sic] been anything other than opinions (expressed), in Hatcher’s opinion.

Norris’ recollection was no one touched Smith; and Smith walked right back over to their side of the room. In contrast, Ford related when Leavitt stood up and pointed his finger in Doug’s face, Ford had exited his chair (at the end of the Union’s table near the door), and walked up to the company negotiating table. Though Coleman didn’t see anyone from the Union side come over and get Smith; and, though Hatcher didn’t (even then) see need, Hatcher nonetheless has confirmed Ford had walked over there and had told Smith to come on back over to their side. Smith testified then only the more credibly Ford did, recalling Ford had said, “Doug, lets go back to our side of the table(;)” and, that Ford had

touched Smith’s arm, getting Smith’s attention, though Smith didn’t know (essentially) about being pulled by Ford. I credit Ford that on seeing Leavitt rise and point a finger in Smith’s face, Ford had got out of his seat, went to Smith, and urged Smith to return to the Union’s side, which Smith did.

c. *The altercation*

General Counsel established: Leavitt is 6 feet 1 inch tall, and weighs 260 pounds; was recruited for college football and there had played defensive tackle; and, that Leavitt has kept up his conditioning by lifting weights and walking. The parties stipulated, Smith is 5 feet 11 inches tall and weighs 205 pounds; and, I find, sturdy.

When urged by Ford and others, Smith turned around and came back to the coffee table. Smith recalls he was then standing off the Union’s negotiating table, in front of, and with his back to the corridor door exit probably 5 feet away. Ford relates convincingly Ford had walked to the front of the Union’s negotiating table; confirmed Smith had walked back over to the front of the room, near the coffee urn, and, that Smith was standing 4 feet to 5 feet from the hall door (below).

After spending 3 to 5 minutes outside on the porch cooling off, Leavitt came back in the room. Negotiations were over as far as Leavitt was concerned. On return Leavitt picked up his note book (a red binder notebook about 5-feet wide) that was on the table and put it carefully under his right arm. It contained the original union and company contract proposals; and, all counterproposals that have been put in front of the Company. It was then between 2 and 2:30 p.m. There was not a whole lot going on in the room. Though there was some discussion on management side; there was not between the two sides. Leavitt relates he walked *through the opening between the company tables where Smith had pulled one out*; and, he headed to the door to get out of there.

Smith was then on the Union’s side of the room, *but not behind or in front of his table, but to the right of the Union’s table, off its leading edge, and about 5 feet from the door*. There was 5 feet from the end of that table to the door. The coffee table being placed midway, its nearest edge was also 5 feet from the door. (Ford confirmed Smith at this time was standing in between the coffee table and the union negotiating table, about 4 feet to 5 feet from the door.) It is even more notable that Ford has recalled explicitly, and without apparent contest, that Smith had not moved when Ford saw Leavitt approach Smith.

Leavitt related it was when he got in range of the door that he saw Smith was there. On cross-examination, Leavitt related (consistently) the first time he realized where Smith was standing was when he walked up to Smith. Somewhat inconsistently though, Leavitt then related he was not exactly sure if he was looking straight ahead, or, watching the ground at the time he walked straight at the door (as would appear to have been more likely if he had come upon Smith unexpectedly as Leavitt described). In any event, Leavitt recounts that when there, he looked at Smith straight in the eye, and said, *Doug, get out of my way*. Leavitt has Smith reply, *you’ll have to go over me*. Leavitt repeated, *get out of my way*. Leavitt has Smith this time say, *you’ll have to either go over me or around me*. Leavitt was directly in front of Smith at this time.

Smith's account is that Leavitt came or charged back in the room, grabbed his (Leavitt's) paper work as he came by his table, and came directly to Smith, where Leavitt bumped chests with Smith. Norris recalled that on entering the room with Attorney Smith, Leavitt grabbed his stuff, and walked straight to Smith, and got in his face; and, Norris confirmed they stopped one another, they butted chests. It is notable in any event that Smith testified, Norris and others corroborated, and Leavitt confirmed, that *Leavitt (initially) told Smith to get out of his way.*

However, contrary to Leavitt version of Smith's response to Leavitt as being to go over him, Smith had testified that Smith had replied, "*You'll have to go around me(;)*" and, when Leavitt again told Smith, "*Get out of my way(,)*" Smith again said (and again essentially corroborated by Norris), "*Chip, you've got to go around me.*" Or, "*No, Chip, you go around me.*" (Norris recalled Smith said, "*You're going to have to go around me.*") Even more significantly, *Smith has centrally testified, there was room at the time for Leavitt to go around Smith, indeed, Smith asserts either way (below).*

Hatcher's recollection is that when Leavitt came back into the room, he picked up his papers, and walked around Attorney Smith and foreman Coleman, and came in a fast pace straight over to Smith. Hatcher recounted, Leavitt then bowed his chest out and arms back, and demanded that Smith *get out of his way.* Hatcher recalled (with some noticeable embellishment) Smith said, "*I'm not going to get out of your way. There's plenty of room, if you want to go around me you can go around me. but I'm not getting out of your way or nobody else's.*" Hatcher relates they were chest-to-chest, or eye to eye. (Bullard, who thought the argument was over, and, in preparing to leave had bent over to get his own notes and papers, looked up and was surprised to see Leavitt had reentered the room and was standing chest-to-chest with Smith. Though acknowledging he couldn't recall exact words, Bullard's recollection essentially corroborated, Smith advised Leavitt if Leavitt were leaving, he would have to *step around.*)

Batts, at the balcony door, confirmed Leavitt went through the tables and around. However, Batts asserts he really didn't see Leavitt when he got to the door, as there were people standing around. Johnson, at one point also in the doorway, recalled Leavitt told Smith, "*Doug, move out of my way(;)*" and, then (disjointedly, and unconvincingly), that when Leavitt asked Smith again, Smith told Leavitt, *either wise (sic) go around him, or go over him or go through him, one of the two.*

Coleman stayed in the room. Coleman was standing 5 to 6 feet back in the room, toward but (as Leavitt confirmed about 3 or 4 feet) away from the coffee table. Coleman recalls that Leavitt, after picking up his notebook from the table, then walked around Coleman. Coleman acknowledged when Leavitt came in the room and picked up his notebook, Leavitt was probably moving faster than he normally walks, not aggressively, but hurriedly like. Coleman confirmed Leavitt walked directly towards Smith, like he was going out the front door; and, they got to within 6 inches of each other. (Though saying on one occasion it was 6 inches to 1 inch, on later occasion Coleman agreed it was 6 inches between them.) In any event, and any indication in Coleman testimony to the contrary notwithstanding, clear weight of more

credible evidence is Leavitt had walked right up close to, and directly in front of Smith, who had not changed his position at all to meet Leavitt.

Nonetheless, Coleman has asserted that he saw it all and in his opinion he really thought Smith was the aggressor. On cross-examination, Coleman then acknowledged: both were angry; Smith wasn't any more angry than Leavitt; and, Coleman didn't really think either one of them liked each other too much. It is even more notable then that Coleman not only confirmed Leavitt had walked up to Smith and said, "*Doug, get out of my way(,)*" but that Smith had then (only) said, "*I'm not going to move. You'll have to go around.*" Indeed, when Leavitt (again) said "*Doug get out of my way(,)*" Coleman recalled Smith (again) said, "*No, I'm not going to move.*" (Coleman account thus notably does not support Leavitt at all in Smith *ever* saying Leavitt would have to *go over* Smith; and, only then the more notable are the additional circumstances that *neither* Batts' or Johnson's accounts are really persuasive on that very point.

Though Coleman has asserted he thought Smith was the aggressor, Coleman on other occasions simply has had difficulty in describing Leavitt's approach to Smith as being in a nonaggressive way. Though Coleman initially asserted when Leavitt came up to Smith it was not closer than you would normally stand to someone in normal conversation, Coleman later acknowledged it was the kind of distance (6 inches) that if someone had just walked up to him that close, knowing that they had just had words, that he would probably feel uncomfortable.

To be sure, Coleman immediately attempted to salvage that (more candid) revelation in then reasserting he did not actually feel like Leavitt was aggressive toward Smith at that time, but I was and am not persuaded by the effort beyond the consideration of its compatibility with the possibility of an unplanned Leavitt confrontational approach of Smith, e.g., with eyes on floor, coming around Attorney Smith and Coleman, and, unthinkingly, but then rapidly and directly upon Smith.

But Coleman then further acknowledged that it was that close (6 inches), when Leavitt had told Smith, exactly, in a harsh voice, "*Doug, get out of my way.*" Coleman recounted, at this point, that it was in pretty much the same tone of voice, Smith had said, "*I am not going to move. You'll have to go around me.*" Coleman relates Leavitt then said, "*Doug, move out of my way.*" Smith again told Leavitt that *Smith was not going to move, and that Leavitt would have to go around him.* Although Coleman related Leavitt didn't yell or raise his voice real loud, but said it firmly, Coleman also acknowledged *you could tell Leavitt meant for Smith to move.*

Finally, even when General Counsel then brought to Coleman's attention that in his prior affidavit (given on May 23) Coleman said (when Leavitt asked Smith to move) Smith had said to Leavitt, "*He would have to go over him,*" (emphasis added) at hearing Coleman nonetheless testified (and, with the weight of the more credible evidence of record then in support of him by far), *the best he can remember, that Smith did tell Leavitt that Leavitt would have to go around him, that he was not going to move.* (Coleman acknowledged he had talked about the incident with Leavitt and other company witnesses before he gave the above affidavit.)

On the weight of what appears to me to be the more consistent and credible evidence I thus find that on entry into the room and retrieval of his notebook, and whatever may have been his initial lack of intent for further confrontation with Smith, in fact, Leavitt had walked directly up in front of Smith, and spoke to Smith in a manner only then likely to renew a confrontation. Thus, even were I to assume Leavitt had initially approached Smith unthinkingly because he had actually walked hurriedly towards the door with eyes riveted to the floor, and in coming around Attorney Smith and Coleman, had come rapidly and unexpectedly upon Smith, it is uncontested that on then seeing Smith in front of him, *Leavitt* had walked up very close to Smith (if not making actual contact with him) initially; and, in discomfiting close proximity to Smith, then had as effectively renewed their confrontation as if intended, in telling Smith, in a firm if not harsh voice, *to get out of his way*. In those circumstances, and especially if with adequate room to do so, I find Smith acted understandably, if not magnanimously, in telling Leavitt in like voice in turn that Leavitt would *have to go around Smith*; that Smith did *not* tell Leavitt on that occasion *to go over Smith*; and, when Leavitt told Smith a second time *to get, or move out of his way*, that Smith reaffirmed a second time that Smith would not move in saying, *“Chip, You’ve got to go around me(;)”* and again, that Smith did *not* tell Leavitt to go over him.

On the material question of whether there was sufficient space for Leavitt to go around Smith, such that Smith was not blocking Leavitt, contrary to Smith assertion that there was, Leavitt has testified that with Smith where he was, and the (Ford) chair where it was, Leavitt could not get around Smith, either on his left or his right. Leavitt asserts there was no way on the side closest to the coffee table and on the other side, a chair was in the way.

In direct conflict, Smith related there was another way Leavitt could walk to go to the door. Indeed, Smith claims Leavitt could (have) walk(ed) either way around Smith, as there was room on *both* sides to go around Smith. In support (though not without some seeming inconsistency) Smith related he did not recall any chairs being around the table then. (On one occasion Smith related that there were chairs *behind* Smith’s table. On other occasion Smith denied there were chairs in the area where a couple of union negotiators had been sitting, Smith then asserting he believed the boys had already started putting up the chairs.)

Norris, in corroborating Smith that there was room for Leavitt to walk around Smith (at least his left side) to the door, recalled there was no chair there; and if the chairs were any where, they were against the wall. Norris otherwise estimated there was 2 feet or more between the (Union) table and where Norris recalls Smith was then standing. On that basis, Norris has corroborated Smith that Leavitt did have room to walk around Smith, though then adding (and, introducing some confusion) because the table was behind him.

Coleman related, if I’m not mistaken and to the best of my recollection, Dean Long was on Smith’s right side and there was a chair or something right there on Smith’s left side. On that basis, Coleman asserts that Leavitt could not have gotten by Smith without moving something (sic). There appears to be no corroborative evidence that Long was standing to one (i.e., Smith’s right) side. Indeed the only other evidence of record is that Long as an observer initially was seated behind

Smith; and, such Long movement is otherwise, if anything, contraindicated by Hatcher general recount that as Hatcher made his way around the union table (below) to get to the (then) embroiled Leavitt and Smith, Hatcher did so through two to three individuals still seated at Union’s table.

Though I observe Long did not subsequently testify to the contrary, there is also clearly no evidence Leavitt had told (or asked) Long, or any person other than Smith to get, or move out of his way. On weight of what appears to me to be the more consistent and credible evidence, I find there was more likely than not no other person *in* the passageway blocking Leavitt’s path to the exit door. But even were it to be found otherwise, it would then be made only the more apparent that Leavitt wasn’t interested in asking, or telling that person to move to avoid physical contact with Smith. However, as noted, I am more persuaded there was in fact more room for Leavitt to pass to Smith’s left, because of the likely proximity of the coffee table on Smith’s right. In any event, Leavitt unquestionably went in that direction to pass Smith, albeit at Smith.

- (1) The question of a clear passage to Smith’s left; and, the nature of the related physical contact

The conflicting evidence over location and limiting effect of Ford’s chair is somewhat difficult of resolution. Ford didn’t believe his chair continued to stay in the location where Ford was sitting. Ford believed when he got up to walk over to where Smith and Leavitt were, Ford had turned his chair. Ford remembered he was going to put it underneath (the table) and couldn’t. Ford also remembered (though thereby generating some lack of clarity), the legs were on the end, and the back was turned to the wall. Leavitt wasn’t sure what direction the chair was. Leavitt reaffirmed only that there was a chair there, to his right. I am persuaded and I find that the feet of the chair were at the end of the table, but most most probably with the front feet of the chair up against table brace or pedestal, and chair seat only partially under the table, with chair back most likely turned (in) and parallel to the coffee table wall. I would only otherwise note that if the chair were turned when Ford rapidly arose to go to Smith, and in such manner as to effect the chair back being parallel to the door entry wall, the chair was then even more out of the way and less of an obstruction.

Smith’s account is in any event that Leavitt leaned on Smith with his weight; and, Leavitt pulled Smith around with the weight of Leavitt’s body. Smith relaxed, and went with Leavitt, or let Leavitt pull him around. Smith has testified that Leavitt then *shoved* Smith, still coming at him; and, at that point Smith grabbed Leavitt to keep from falling. Smith explained that once *Leavitt had pushed Smith with his hands*, Smith was falling back; and, Smith got a hand on Leavitt’s lapel, and one on his shirt or coat sleeve. (Leavitt has recalled Smith had his two hands on Leavitt’s lapels. Leavitt confirmed that Leavitt had a hand on Smith’s collar.)

Smith credibly recounts that Leavitt, with one hand on Smith’s collar, and the other on Smith’s chest, then pushed Smith back across the room. Leavitt’s related account is they spun each other or danced across the room to some degree. Smith states Smith’s feet may have shifted to accommodate him going around, but they were not waltzing; and, Smith was not repositioning himself for anything. Though Smith acknowledges that he was pushing back, it is clear that at

this point Leavitt had overpowered Smith, and pushed Smith back across to Leavitt's side of the room.

Leavitt however has *denied* that he at any time had shoved the palms of his hands into Smith's lower rib cage. Johnson, who as noted below related people were standing between him and Leavitt, adds little in relating he did not see Leavitt make a motion to Smith with palms pushing into Smith's ribs. Coleman (then seemingly from behind Smith) recounts their hands went up at each other.

Leavitt has also *denied* he had treated Smith as an opposing tackle, but Leavitt acknowledged it was not a real calm situation. Leavitt's version is that after Leavitt had asked Smith to move twice and Smith responded as he did, Leavitt, having the notebook in his right hand, took his left hand, and had reached across for the (Ford) chair with his left arm, bending down to move the chair, and, in doing so, taking his eyes off Smith. In thus attempting to get around Smith, Leavitt asserts he moved the chair and had stepped to that side. *According to Leavitt, at that time Smith made physical contact with Leavitt. Smith rammed Leavitt with Smith's chest, and grabbed Leavitt.* Leavitt further asserts when Smith did so, Leavitt's notebook was knocked to the floor, or he was relieved or dropped it, or whatever; and Leavitt had then turned and went to a defensive position.

Batts affords little or no support on the latter for Leavitt. Batts relates he really didn't see Leavitt when he got to the door, as there were people standing around. Company witness Johnson offers little more. Johnson couldn't answer if at that point there was room for Leavitt to get around Smith, confirming there were people standing up. Nonetheless, Johnson has (albeit disjointedly) asserted that the last thing that he saw was Leavitt made a motion to move a chair to go around, or something, and the next thing Johnson knew—well, everybody was standing up here—and the next thing both of them had a hold of one another.

It is first and perhaps most notably observed, that not only does Batts relate blocked vision and offer no corroboration at all, but even Supervisor Johnson does *not* corroborate Leavitt's assertion that Smith had rammed Leavitt with Smith's chest at the moment he purportedly perceived Leavitt had acted to move the chair. Even when considered otherwise, Johnson's account is simply not convincing, if not shown inconsistent with earlier acknowledged people standing around that had blocked Batts' view. Leavitt's support comes down to Coleman, who was closer. At time of such movement Coleman was to the back of Leavitt. Yet Coleman has only tentatively asserted it looked to him as if Leavitt had reached down to move the chair that was beside Smith, and like Smith had pushed up against Leavitt.

Smith has categorically *denied* that Leavitt made an *attempt to go around Smith*. Norris corroborated there was *no motion to go around*, testifying it was more a *motion to go through*. Hatcher, who was seated at the further table, recalled he had leaned forward on his table, watching them. Hatcher recounts consistently, he saw Leavitt circle counterclockwise around Smith; and Smith followed around Leavitt. Somewhat in between Smith and Leavitt accounts (but clearly more consistent with recollections of Smith and Hatcher (above) and Ford (below)), *Bullard recalled as Leavitt was stepping around Smith they were still chest-to-chest.*

Thus, all accounts of General Counsel's witnesses are wholly inconsistent with a Leavitt assertion of reaching

across his body with his left hand to move a blocking chair and being then rammed by Smith's chest. Leavitt only denied Smith and he did any kind of a chest-to-chest movement where they went around sideways with each other *without contact*, which in literal sense doesn't meet, let alone adequately address the General Counsel's witnesses' essentially mutually consistent accounts that Leavitt (even) if stepping to Smith's left side, had no less made the physical contact, and turned Smith forcibly with Leavitt's chest.

In contrast, Smith has explicitly and severally denied: that Leavitt had reached down with his left hand to move a chair, to get it out of the way; that Leavitt had moved to the right to get around Smith; that Smith had then bumped Leavitt; and that Smith had (first) grabbed Leavitt by the lapels and Leavitt's notebook flew out and hit the floor. Smith has recalled the notebook flew off somewhere after Leavitt assaulted Smith with two hands, and it came out from under his arm. Smith's account is essentially internally consistent, but not persuasive on when the notebook most likely came out, for I am persuaded the notebook came out as Leavitt was turning Smith forcibly with Leavitt's chest, as others have described.

In contrast with Coleman's view from behind, several witnesses of the General Counsel had an even better side view of the start of this incident. Ford, standing in front of the Union's table recounts, Leavitt had walked directly up to Smith, face-to-face, up close, and when right up in Smith's face, Leavitt told Smith to get out of his "damn way." No other witness has recalled this profanity. Though I found Ford generally to be a reliable witness (despite a disjointed start in his testimony) in *this* (and prior) instance I am reluctant to fully credit Ford's account of a Leavitt profanity where not confirmed by others, since Ford also clearly viewed Leavitt had renewed this confrontation. (When asked directly, Ford testified relatedly that he wouldn't know the reason for Leavitt to be chest-to-chest with Smith other than just to continue from where they had left off previously.)

However, Ford (with others) has corroborated Smith replied, *you'll have to go around me*. Moreover, once again revealingly, and in what I conclude and find in the end most closely approximated what probably occurred, Ford recounts Leavitt had then walked like his chest up to Smith; Leavitt turned Smith with his chest; when Leavitt turned Smith, Leavitt's materials fell to the floor; and, Leavitt then stepped back, and shoved Smith with the balls of his hands. Apart from the questioned profanity, Ford's account had the ring of truth to it; and, it draws very substantial support from the accounts of others.

Norris was seated midway at, I find, the 6-foot union table located further from the corridor door. Bullard was at the far end of that union table. In confirming Smith (and Ford), Norris recalled that when Leavitt was turning around, his back was to the (exit) door, but Leavitt then had made no motion (continued movement) to the door; and, Leavitt was not walking out the door. Norris (as Ford) recalled seeing Leavitt (first) drop his papers, and then come up pushing Smith. Bullard confirmed Leavitt got almost out the door when he shoved Smith; and, as Smith was falling, Bullard saw that *Smith had grabbed Leavitt's tie, to keep from falling*. Bullard otherwise summarized the two had then basically locked up, and it turned into a wrestling match.

Hatcher (in this part inconsistently) recalled Leavitt took one step back, and dropped his book. However, Hatcher otherwise consistently recounts he then saw Leavitt's hands from his gide came back at Smith with a 6- to 8-foot or maybe 8- to 10-foot thrusting move with heels of his hands into Smith's lower rib cage. (Norris confirmed when they had turned around and Leavitt had his back to the door, Leavitt took his hands from in front of his chest and had pushed out about six inches, pushing Smith.) Hatcher recalls Smith then grabbed Leavitt by the tie and/or the upper shirt; Leavitt grabbed Smith; and Smith grabbed Leavitt's wrist. Hatcher recounts, hanging on to each other, but with Leavitt pushing Smith in a forceful move, and Smith, without choice, following around in a counterclockwise circle, they went all the way around maybe three times in a semicircle, winding up over in the corner, traveling some 10 to 15 feet.

(2) The question of one fray or two; and, of an additional physical blow

Leavitt asserts when he and Smith were at the other side of the room, Attorney Smith and Coleman came in and broke them up. Leavitt relates Attorney Smith had grabbed Leavitt; and Reno Coleman grabbed Smith. Leavitt's version is that at that point Leavitt had stepped back; put his hands in the air; and walked back to the corner directly opposite the hall door entrance. Leavitt asserts, that at that time Smith was standing in a position about 6 to 7 feet away from Leavitt. Leavitt recounts he and Smith then had another exchange. Though Leavitt did not recall exact words, Leavitt recalled he responded Smith hadn't tried to negotiate since day one. They said a few (more) things to each other. Then, Leavitt said why don't you grow up; and, Smith replied, why don't you grow up.

Coleman confirmed he got right in between them, and that somebody else, whom Coleman believed to be Attorney Smith, helped Coleman separate them. Coleman states Leavitt backed up, with both Leavitt and Smith still talking to one another. Coleman recalled Leavitt was backing up to the corner opposite the exit door (but Coleman does not confirm a 6- to 7-foot distance between them). Coleman relates to the best of his recollection, Leavitt had then told Smith, we can not get nothing done with you acting like this and all; and, Smith replied, "You're standing in the way. You don't want to negotiate or anything." Coleman confirmed Leavitt told Smith he needed to grow up; and, if not mistaken, Smith told Leavitt the same thing, "You need to grow up too."

Leavitt's version is Smith then became frustrated, and Leavitt asserts *Smith came at Leavitt again*. Leavitt took a defensive posture, put his hand up, and when Smith came at him, Leavitt relates Smith ran into Leavitt's hand; and, Smith again grabbed onto Leavitt. Leavitt asserts that he was going to take the same defensive position he had taken before, and catch Smith around the collar. According to Leavitt, Smith came running straight on; and Smith ran into *it* (Leavitt's hand), and Leavitt knocked Smith's sunglasses off Smith's face. Leavitt confirms he had Smith by the back of the neck at that time; and, Smith had Leavitt by both lapels. A number of people got into the situation. Leavitt recalls Hatcher got in between them; and, they parted. Leavitt picked up, or was given his book; headed for and walked out the door.

Coleman's account supports Leavitt to the extent he relates *Smith charged Leavitt*; that Leavitt held his hands up, and it (sic, a hand) knocked Smith's glasses off, as he (Leavitt) was trying to block him (Smith) off of him. Coleman jumped right back into the middle of them and tried to stop it, grabbing a hand of each of them (on his side) and trying to pull them apart. About that time, some of the rest come over there and helped part them.

Again Batts and Johnson offer little help to Leavitt. Batts recalled *they were back against* the far wall in the room; but Batts didn't know how they started up again. Batts didn't hear anything that was said prior to it starting back again; and, *Batts couldn't even say for sure who moved toward whom, or who had actually started it the last time they went together*. Johnson's account is even more general, that they were broken up; they had some words; and somehow or another they started again. Batts' and Johnson's accounts of a renewed fray are *singularly* unpersuasive in absence of details of their (generalized) last time they went together, or, started again; especially if 6 to 7 feet then separated the two protagonists, and Smith had (purportedly) charged Leavitt from that distance.

As noted, Leavitt recalled (and I find) they (initially) did end up with Smith facing the (Union) door side, and Leavitt facing the Company's side. However, I credit Smith's recollection that when there, they further navigated to where Leavitt's back was to his side of the room, and Smith's back was to his side of the room. Thus, I find they had reversed their positions when Coleman (and Attorney Smith) *first* made contact with them, from behind.

Because Coleman was speaking to Smith, Smith convincingly related that he believed then and believes now that Coleman was the first person to put his hands on Smith; and, that it was later that Attorney Smith grabbed Smith from behind, in what Smith viewed as an assault also. Smith recalled at the time Coleman did so, Smith's back was to the door leading to the hallway (corridor); and, Coleman got Smith from behind. No one then had control of Leavitt, though Smith could see people rushing up, and there were hands, as by this time other people were trying to get involved.

Smith recounts Line Foreman Coleman came up and grabbed Smith from behind, twisting Smith. Smith's testimony is that as Coleman did, Smith's hand came off (Leavitt). According to Smith, it was then that Leavitt *punched Smith in Smith's lower rib area, or cage*, with Smith sustaining a bruise there, as diagnosed by the hospital that Smith went to later that day. However, Smith recounts they were still very close, about 18 to 20 inches; and *Smith still had Leavitt with one hand*. Smith acknowledges he then went back on Leavitt; and, that's when everybody really got into it; and, they were on Leavitt (too).

Leavitt has *denied* that he at anytime struck Smith with his hand or his fist. Johnson didn't see anyone strike or hit another. Nor did Batts. Coleman is notably silent on that matter.

In contrast, Ford had corroborated Smith that Leavitt struck Smith. Thus, Ford recalled that Leavitt had first put Smith up against the wall; and, then Smith had turned and put Leavitt up against the wall. As Ford was going to where they were, Ford saw Foreman Coleman grab Smith's arm; and as Ford came around the right side (of them), *Ford saw*

*Leavitt strike Smith in Smith's right side, with Leavitt's left hand.*

Smith denies that after Leavitt and he got apart that Smith came back at Leavitt. Smith asserts that once he completely broke contact, he backed away and off to the wall with his back to Attorney Smith. Smith didn't recall it at all as a renewed fray, i.e., in which Smith came right back in Leavitt's face; or of Leavitt then throwing his hands up to stop Smith; and, Leavitt knocking Smith's glasses off when Leavitt threw his hands up. Smith and other witnesses of the General Counsel uniformly didn't recall two confrontations and have testified there was only one. Ford and Norris have (explicitly) corroborated. Ford recalled they had ended up in the far corner of the room in one continuous event; and Norris has explicitly corroborated Leavitt and Smith did not go back together; and, he saw them together just the one time.

Smith specifically did not recall the two grabbing each other again, and spinning around to Attorney Smith, at which time Attorney Smith assaulted him; grabbed his arm; and said, "Doug, let him go." However, Smith did recall telling Attorney Smith while embroiled with Leavitt (after Coleman grasp of Smith from behind, punch by Leavitt, and Smith's renewed grasp of Leavitt with two hands), "Britt, God dammit, get your hands off me." Norris believed that when Attorney Smith grabbed Smith, Smith had said "you don't touch me." Bullard recalled Smith told Attorney Smith to get his hands off Smith, but not the profanity "g— d—."

Even Johnson initially thought when Attorney Smith was trying to get between them, that Smith told Attorney Smith (only) not to touch Smith, or, not to put his hands on Smith. However, General Counsel established on cross-examination, Johnson had given an affidavit to an agent of the National Labor Relations Board on May 23. Page 1 line 11, provides: "During the meeting an altercation occurred between Chip Leavitt, a management employee, and Doug Smith, an employee. Company Attorney Britt Smith was one of the people present who tried to pull Doug Smith away from Chip Leavitt. 'I heard Doug Smith tell Britt Smith, 'get your god damn hands off of me.' Rick [sic] said 'okay' and let go of Doug Smith.'"

Ford's account essentially confirmed Smith's more candid acknowledgement (and Johnson at least affidavit confirming account), that when Attorney Smith grabbed Smith, Smith told Attorney Smith to get his "god damn" hands off of Smith. As in the past, I have found Ford to be a generally reliable witness; and I find him so here. Ford recounts Attorney Smith promptly did release Smith; and Attorney Smith then pointed to Hatcher to tell him to come over there. Ford confirmed Hatcher was already on his way there and then stepped in between them.

In contrast with his above asserted view of it being previously only an exchange of opinion, Hatcher recounts when he was looking down the table and he saw Leavitt step back and give Smith a shove, then, Hatcher said he had better get up and do something, as it was his responsibility as business manager to represent the employees regardless of what the situation is in a confrontation like that. Hatcher got up weaving through chairs with two to three people still seated at the table. Hatcher recalled as he got around the table there were (already) three to four people over in the corner trying to separate Smith and Leavitt, both of whom had just flipped others off. As Hatcher got to the end of the table, they were

then 3 to 4 feet away from the corner with Smith (again) having his back to the wall, and with Attorney Smith motioning for Hatcher to come get him.

Thus, Hatcher relates credibly Attorney Smith was yelling at Hatcher, Russ, come and get them apart. Hatcher approached and got his (Hatcher's) arm, and then his shoulder between them. Hatcher relates they offered no resistance as he did, and he next moved between them. Hatcher kind of shoved Smith back a little bit, and backed up on Leavitt. Again there was no resistance at all. When Hatcher had them separated 3', Hatcher turned around, grabbed Leavitt by the waist, and said, "Come on, let's go outside into the hall." Leavitt told Hatcher it was Smith's fault; that Smith was always creating a lot of problems. Hatcher said, "Okay, come on, let's go out in the hall."

Hatcher recounts that they went on down the hall a couple of feet, so Leavitt and Smith could not see each other. Attorney Smith came out with Ford. Hatcher recalled that Leavitt then said, "It's all your fault," referring to Hatcher, saying, because you can't control your negotiating committee any better than that. Hatcher let it pass. Hatcher has acknowledged he never made any comment with regard to the conduct of any of the Employer's representatives during the negotiations; nor did he ever make a request of Attorney Smith as spokesman for the Company to control its members. Leavitt acknowledged he did not personally ask Ruff and Hatcher to remove Smith from the committee.

When Leavitt left the meeting room on May 9 and walked out the door, Leavitt acknowledged he was frustrated, upset, and angry. Leavitt's version is that Hatcher was behind him. Leavitt turned to Hatcher and said, Russell, you haven't tried to control this situation; and, again, you haven't tried to control it, and it's your fault this thing came off like that. Then, Leavitt left. Coleman relates if not mistaken Ruff had Smith backed over to the center of the room and Leavitt and Coleman started out the door, though confirming Hatcher went out with them. Coleman otherwise recalled Leavitt and Norris had also started saying things to each other; and, when Leavitt was outside the room in the hall, Ruff told them they needed to quiet Leavitt down.

Smith testified that he did not hit Leavitt, but Leavitt threw a punch at Smith. Smith went to the Brunswick County Law Enforcement Complex where Smith talked to the magistrate. Smith had an assault warrant sworn out against Leavitt. Leavitt has filed no similar criminal complaint against Smith. Smith relates he did not file an assault charge against Attorney Smith because Attorney Smith did not hurt Smith.

Leavitt received a bloody lip, and the next morning he was a little sore from the pushing and shoving, but he did not go to a doctor. Leavitt confirms, Smith had filed criminal assault charges against Leavitt immediately after the incident; and that Leavitt (then) had a criminal court date coming up. Leavitt also confirmed that he has not filed assault charges against Smith, though Leavitt believed Smith was the aggressor. Leavitt offered explanation he didn't like the idea that this happened in the first place; and he didn't think there was any reason for stretching it out. Leavitt didn't personally have anything against Smith. It was ended and that's where he stood on it. The fact is however, on the following day, May 10, Smith was fired; and, Leavitt was not.

Leavitt acknowledges that he first knew that the Company was going to discharge Smith when they went back to the office that day, May 9. After Leavitt left the CB facility, he went by the Oak Island office, dropped Batts off; and then Leavitt went back to the Shallotte office to meet with General Manager Batten. Leavitt explained the incident to Batten. Batten evaluated what Leavitt told him; and, Batten also discussed it with Attorney Smith for his recollection of the situation. Batten reviewed the policy book, E36, work rule number 28 (Assaulting or threatening a supervisor or any other employee); and, reviewed Smith's entire personnel record, including a review of the other pending (sic) instances in there; evaluated those together and said the combination of those violations would terminate Smith. Batten and Leavitt reviewed the issue of Smith. On cross-examination, Leavitt acknowledged at the time Batten went over the (Smith) personnel file, Batten was making a decision to fire Smith.

Batten confirms that he had a conversation with Leavitt as soon as Leavitt got back from negotiations on May 9. Just prior to that conversation Batten had received a call from a local news reporter, who informed Batten that an incident had happened at the negotiating meeting. Thus, Batten already knew something about it before Leavitt walked in the door, but not before. Batten prepared a news release in which Batten told the reporter Batten could not give her the details; that he would have to investigate; and, he faxed that release to her that evening.

When Leavitt came in the Shallotte front suite office, Batten immediately told Leavitt Batten had a call from the reporter, and also that Batten wanted Leavitt to give Batten full details of the entire situation that happened at the union negotiating meeting from first to last. Batten made notes about that interview; and, Batten gave them to his secretary to transfer into writing. In related response to General Counsel represented nonreceipt of the notes in response to his subpoena for any and all documents Batten had utilized in effecting the suspension and termination of Smith, Batten stated initially that he thought the notes were supplied; then, that he didn't know if that was relevant; later, that he didn't think about it; and finally, that he guessed he threw it in the trash can. None of this do I find very convincing.

Batten otherwise relates after he had studied Leavitt's full and detailed explanation. Batten took it as an aggressive action upon Smith, meaning the aggressor appeared to be Smith. In that regard, Batten initially summarized his reasons were: *Smith had come over to Leavitt in front of their table; Smith had blocked the exit going out; and, Smith grabbed the collar of Leavitt.*

Batten relates he next looked at policy E36; and went through all 29 to 30 work rules in policy E36. *Policy number, E36-28, clearly said, any threats or assaults by any employee to a supervisor or any other employee asked for discipline action.* Batten went to Smith's personnel file. In the file there was a verbal warning. There was also a written warning (the issuance of which I have above addressed at length and found tainted with discrimination), where Smith had received (disciplinary) action of 4 days without pay; and, which clearly indicated that any other violation of work rule policies within a 12-month period of time would create immediate termination.

Batten studied through it very carefully. Batten initially asserted he made sure within his own mind and his own heard [sic] that E36-28 was certainly in violation. Batten later testified that with those things in mind, in his decision, this was a clear-cut further violation of threatening and assault to a supervisor or another employee.

*Batten initially testified he didn't speak to anyone other than Leavitt and Attorney Smith.* Batten later revealed he talked to Johnson and Batts after; and, then recounted that was in finalizing—getting the full information from them. Batten has also asserted that (talking to Johnson and Batts later) had nothing to do with the decision in the case, then stating, *"This was policy."*

Batten made his decision after Batten had investigated the incident with Leavitt, and received detailed information from Leavitt; after pulling the policy out, reviewing the policy in full; and after going to Smith's personnel file and reviewing it. Batten also reviewed that information and the action he was taking with Attorney Smith; but Batten, not Attorney Smith, made the decision. At the time Batten talked to Attorney Smith, it appeared that termination of Smith was the direction to go. In investigating, Batten never spoke to Smith, or any other employee in attendance. Batten has also testified that over the last 4 or 5 years, probably 9 or 10 employees have been terminated on the basis of BEMC's Service Rules and Regulations and Policies.

When asked for his recollection of Leavitt's details, Batten relates that Leavitt's account to him started at the beginning, and his account essentially tracked Leavitt's account above. However, and notably, it covered, inter alia: a Smith remark about management being sorry; Leavitt recount to Batten that during the negotiations there were continued Smith outbursts, to the point that Attorney Smith reemphasized the "one-spokesman" rule, and confirmed Attorney Smith's authority to determine if Smith was breaking the one-spokesman rule. However, Batten has revealed he really did not understand the operation of the rule; and, even more significantly, Batten was unaware the rule had not been agreed to by the Union (a factor of course Batten could not have then evaluated). Batten also acknowledged *Batten didn't ask Leavitt what the Smith outbursts were, nor to what subject(s) they related,* but had simply accepted Leavitt's report thereon.

Batten recounted, Leavitt report to Batten was Attorney Smith enforced the rule against Smith, and said, *"We're out of here;"* that Smith immediately went around his table and approached Attorney Smith in front of his table flashing the proposals in a loud, (as Leavitt said) upset voice to Attorney Smith; that Smith turned to Leavitt and they had words; that during that conversation, Smith pulled or jerked the table back and got very close up to Leavitt's face; but that *Leavitt said they did not have any kind of confrontation;* and, Leavitt then backed away and went on the porch to cool off and readjust and realign his ownself and thinking. Batten added Smith's table pull as an indication of who was the aggressor.

When Batten was relatedly asked *if he had received a report that some of the other management officials and/or attorney were also involved in Leavitt's leaving to go to the porch, Batten at first repeated Leavitt told Batten that he left. However, Batten then added Batten thought someone had touched Leavitt on the arm; later recalling it was Attorney Smith who had said he sort of touched him on the arm; and,*

finally recalled that Leavitt said somebody reminded him, don't go any further.

In recounting Leavitt's version of the start of the physical altercation, Batten related reported circumstances of there being a chair sitting at the end of the union table and a coffee table on the lefthand side making the narrow way very close; Leavitt reported, "I told him to move" and Smith replied he'd have to go over Smith, and (essentially) repeat of same; Leavitt movement of the chair with his left hand, and report Smith had sort of rammed Leavitt with his (Smith's) chest, and Smith caught him on the collar or lapel; that following some little scuffle or some little tussling, with the help of others, it broke up; and, that after Leavitt had backed away, Smith rushed Leavitt again; and, Leavitt held up his forehead and Doug ran into it; they had another tussling match; they were separated again; Leavitt got his book and left.

The way Smith rushed Leavitt again as it was given to Batten was, that after the first scuffle and the separation, Leavitt had backed away back over toward their corner, back over toward their table, whatever; and Smith came back over to Leavitt; and, at that time grabbed Leavitt again around the collar a second time. Batten relates Attorney Smith was in the Board room; and, Batten came in there and got full information from Attorney Smith also. (Attorney Smith did not testify as to these matters.)

In what must be viewed as following an instance of Batten being initially evasive on the subject, when pressed, Batten only then testified that *he had never heard a report about Leavitt putting his finger in Smith's face; nor any report of it occurring just before Smith moved the table.* And in what in my view was even more revealing of Batten's one-sided approach in investigation of the reported incident, *on a direct inquiry of whether consideration was made of whether Leavitt was at fault, Batten responded very abruptly and perfunctorily, Leavitt was sent there on Board resolution and myself as a chief or a key negotiator. He was sent there and represented this Company. Period.* Batten's denial of record that he didn't know that Leavitt did not in fact assault Smith appears ambiguous.

In rebuttal the General Counsel called Bullard who then testified, after the incident on May 9th was over, and the company team had left the room and the union team was still sitting in the room talking among themselves, Attorney Smith reentered the room and began gathering some notes and things he had left behind. Then someone, Bullard didn't remember who, said, *Britton, Chip really messed up this time.* According to Bullard, Attorney Smith paused for a moment and then said, *I know and I apologize to all concerned.* When then cross-examined and exhibiting some confusion on the details of those present (but not the remark), Bullard exhibited some antagonism, while denying he was getting angry; asserting, he just want to make sure Attorney Smith understood him.

In rebuttal Ford recalled that after the altercation on May 9 was over, Attorney Smith said, *I apologize for Chip's actions today.* On cross-examination Ford confirmed that Leavitt was not in the room at the time: but did not recall if there were any other company representatives there. Neither Smith nor Hatcher testified in rebuttal. (At least Hatcher had returned to the room.)

Attorney Smith has been labor relations counsel for BEMC for approximately 18 years. Attorney Smith testified in rebuttal at the end of the May 9 negotiating session he did walk out of the room with other company officials, following Leavitt; and that Hatcher and Norris went out with them. Attorney Smith testified solely on the rebuttal testimony of Bullard and Ford, explicitly that when he returned, no one in the room said to him, "Britton, Chip really messed up this time;" nor did Attorney Smith reply, at any time, "I know, I apologize to all concerned." Attorney Smith testified that what he said (seemingly on return) was, "*Gentlemen, I regret that it has come to this. We can not seem to get anywhere and it is a sad state of affairs.*"

#### 8. The termination of Douglas Smith on May 10

##### a. The discharge interview; and the reason stated for discharge

Hayes asserts that he had 35 employees in Whiteville; and loved everyone of them, including Smith when there. Hayes worked with them; and he went overboard with them to the fullest extent that he knew how. Hayes said, but somewhere, sometime you've got to draw a line. Hayes relates that on May 10, Hayes brought Smith into his office and discharged him. It is clear however that it was Batten who had solely directed the discharge of Smith.

Batten testified that he personally put together the dismissal of Smith. Batten informed Leavitt that Batten's decision was to terminate Smith; and, Batten had Hayes communicate that termination to Smith the next morning.

Hayes confirms that between 6 and 7 p.m. the day before (May 9), Batten had called Hayes (seemingly) at home after work. Batten informed Hayes of what had happened at the CB facility. Batten then told Hayes of Batten's decision on what was to be done; and Batten asked Hayes if Hayes would do it the next morning, since Hayes would be there when Smith came to work; and Hayes told Batten that he would.

Hayes was there the next morning before Smith. Hayes asked Herring to come to Hayes' office with Smith, when Smith came in, but not before starting time which was 7 a.m. at that time. At 7 a.m. Herring came over with Smith. Stevens was with Smith at this time, at Smith's initial request. They came into Hayes' office. Hayes taped the discharge interview. Hayes started to read the statement that Hayes had prepared about Smith's termination. As Hayes started to read it, Smith interrupted Hayes because Smith saw through the back window of Hayes' office that another employee, Zeb Hewitt, a union steward, had driven up on the parking lot. Smith requested the meeting be held up for Hewitt's attendance, and Hayes agreed. Smith confirmed that at the time that he was terminated, Hayes, Herring, and (union steward) Zeb Hewitt were present, and Stevens then excused. When Hewitt came in, Hayes took the the discharge notice, and read it to Smith. Hayes said: "Okay, Zeb is in here. Doug, I'm doing my job and I've got something here I've got to read to you, so please listen real good.

This is to advise you that you're terminated immediately based upon prior warnings and violations of policy number E36, number 28, Assault on a Supervisor.



You're not to enter on Co-op property at any time or anyplace."

Hayes then asked Smith for his keys. Smith had none to give. Hewitt then said, "Wait a minute, what are you firing him for." Smith initially recounted, "That's all right, I know what for. Ain't no problem. I was assaulted yesterday. Everybody seen it."

b. *The FBI investigation(s)*

However, Smith on that occasion also then said to Hayes:

*I ain't had no problems, Ronald, until I told you about the FBI. They are going to meet with me this morning. You are right in the middle of it. I know you're in the middle of it. All of you is in the middle of it. You think you can beat on me and you're messing with the wrong damn one, son.*

Hayes added Smith was very upset, slightly abusive, but not bad; nothing like he had been. However, Hayes asserts, the one (thing) that got Hayes is where Smith brought up the FBI. Hayes didn't really know what Smith was talking about. Hayes also remembered Smith said not to worry, that, "I will be back." Hayes asserts that statement was one that Hayes didn't know how to take. Smith then left.

Smith had acknowledged he had first told Hayes about an FBI investigation months earlier out in the parking lot. Smith didn't recall what Hayes said at the time. Though at hearing Smith acknowledged he had been in contact with an official of the FBI; Smith didn't know if there was an ongoing investigation; and, he had received no instruction from the FBI regarding the contact. With reluctance, Smith related his knowledge was that a special agent of the FBI out of its Wilmington, North Carolina office had contacted another unit employee, a Shallotte serviceman, but had not contacted Smith personally, as Smith had no knowledge about any (alleged) wrongdoing at the Company. However, Smith did attend a meeting at which other employees were in attendance, and at which Smith listened to testimony from other people about certain (alleged) wrongdoings of cooperative officials that (other) employees thought were going on in the cooperative.

In summary, there was a Smith reference in his discharge interview to an ongoing FBI investigation; Smith hadn't personally said, or reported anything to the FBI, as he didn't have any knowledge about any wrongdoing by company officials but in his discharge interview Smith did say to Hayes, that when he (earlier) had told Hayes about the FBI investigation, that's when things had started (happening).

In that regard, and *without* his review of the tape made of his discharge interview, Smith had not recalled the related transcript references to being in the middle of it; though he had recalled some substance of it; namely, saying, "Ronald, you're right in the middle of it," and, then looking at Monte Herring, saying, "Monte, you're right in the middle of it too." Smith acknowledged that he was referring to corruption; and, that he had no personal knowledge or proof of Hayes and Herring corruption, but believes there is. The tape reflects Smith accused Hayes, but (only generally) others of being in the middle of it.

Smith testified at hearing that he did not believe that his involvement with the FBI was totally the reason for his discharge, explaining what he meant by saying to Hayes, "I ain't had no problems until I told you about the FBI," was that he was upset that morning; and at the time felt that since he had told Hayes about the FBI, and, since he had (later) received a threatening phone call at home; he kind of felt like that, as everything was coming at him very quickly; but he (now) knows better that the reason for him being fired was not because of the FBI.

Batten testified that in 1988 the FBI had contacted Batten. They did a background investigation on Batten, and his reputation for truthfulness and honesty. It was a confidential situation at the time. That case is over with now. At that time the FBI was doing an investigation in the Shallotte area that required BEMC action to participate with them. Batten recounts, after an FBI agent had identified himself, the agent told Batten the FBI had already conducted a full background investigation of Batten, as well as Operations Manager Gore, personally and professionally. The FBI agent then asked BEMC to engage in a secret operation which involved BEMC hanging some equipment for the FBI. Batten recounts he has had *no other* contact from the FBI in regard to BEMC, or his personal situation.

Batten testified REA does a continual (reaching back into last) audit of the accounting practices of BEMC; and, they usually come in about every 2 or 2-1/2 years, with REA's last audit on November 27, 1989. The audit is also a USDA obligation. Thus USDA's field accountant (an auditor) jointly audits with REA. The audit includes everything: construction funds; borrowed money; all REA accounting procedures; all REA procedures reviewing 2-, 5-, 10-, and 20-year work plans; and, a review of everything of a money nature, e.g., billings, accounting procedures, contract agreements, bulletins (regulations), etc. Batten testified that to this date, the REA has never determined BEMC was not in compliance with loan agreement and REA bulletins.

(1) The threatening call

The threatening call made several months earlier started "Hey hero"; and on that account Smith thought it was from an old Army buddy, as Smith knew (from experience) that expression is used in the military quite often. When Smith in turn replied how it was going, the caller then said, "When a hero sticks his neck out too God damn far he'll get it cut off everytime." The caller then hung up. Smith couldn't identify the caller.

c. *Other factors offered on Smith-Batten animosity*

Smith grievance on Cartrette discriminatory treatment and Batten limited response has been earlier addressed. Smith has otherwise acknowledged: that he doesn't like what Batten has done to the men; that he has accused Batten of having a BEMC contractor build a pier on his house, an allegation which was told to the FBI, but *he clarified not by him*. Smith acknowledged he possibly had told (repeated) it to other employees, without having observed (contrary) check proof, though having been told that there was such. Smith acknowledged he never asked Batten if it were true; and, Smith stated he didn't think he owed Batten that before he went around and spread the rumor.

Though Smith was not sure, the tape of the interview in evidence indicates Hayes said, "I've never tried to beat up on you;" Smith reply, "No, but you support them;" and Hayes reply in turn, "I support the Co-op." Though Smith believed he had said, "Mr Batten doesn't have enough nerve to come down and fire me;" the tape reflects he used the more general term "they" haven't or don't "even got nerve to come down here." Hayes made no reply. In that regard, Smith acknowledged he (and I find, then) came over and picked up the tape recorder; denied that he slammed it down real hard, or twirled it around and around; but acknowledged he spoke into it directly. Though when questioned Smith agreed that he had said (seemingly into the recorder in the meeting), that Mr Batten was a spineless individual for not coming down and handling this personally, but Smith would be back, the tape reflects he at that point said (only) "All I want to say is that I will be back." Smith then left. Smith shortly returned and asked for his money. When Hayes told Smith and repeated that absent being shown it in writing otherwise, Smith would get his paycheck on his regular payday on Friday, Smith then left.

Stevens has testified that Smith just didn't like Batten. Stevens then spoke of an occasion at work in the field that Smith had told Stevens that Batten was a crook, and, that Smith can shoot him in the legs and watch Batten squirm around. Smith placed the remarks as said way after the election and while they were talking on the job how the Company was treating them, unfair pay and everything. Stevens also testified he just thought Smith was cutting a fool; and, that Smith was not serious about it. There is no evidence Batten knew of this comment; nor, that it was considered in Smith's discharge.

Hayes has acknowledged that they have slowed down on right a way work tremendously, because Hayes did not have anyone that would transfer to Smith's job for cross-training.

#### Analysis, Conclusions, and Findings

Batten did not inquire into the nature and subject matter of the Leavitt reported outbursts of Smith. I find Smith's various comments about the subject of wages in the morning and afternoon negotiation sessions of May 9 were protected, and not disruptive of the negotiations, though they may have been perceived to be under Employer's view and self-imposed one-spokesman rule that remained unaccepted by the Union.

Thus I find Smith was effectively engaged in union and other protected concerted activity when during the course of negotiations conducted that day, Smith asserted (or reasserted): (1) The lineman wage rate proposed by Employer was inadequate, as (claimed) apparent when compared with warehouse coordinator rate; and, including when Smith had continued that discourse with Attorney Smith after the latter had said Employer was leaving, when, having asked for and received union permission, Smith would not stop talking on wages when Employer requested. (2) Smith asserted general insufficiency in the Company's wage offer. (3) Smith stated (even if erroneously), if the Company would quit spending money on, or putting money in industrial centers, the Company could pay the men more money, or, would have more money to pay the men. (4) Smith told the Company that it needed to pay these (service) men a fair wage. (5) Smith variously pressed Attorney Smith and management that the men

were worth more money than the Company was then offering. (6) Smith, in response to employer proposal for red-circling certain rates, and related discussion with the Union, advanced a different, if not contrary union position of demanding more money and an across-the-board wage increase.

Smith's protected status in thus engaging prominently in Union and other concerted activity was not lost by Smith remarks to company representatives in bargaining, that: (1) Employer was doing the employees of line foremen wrong, and they knew it. (2) Management was pretty sorry, in that they wouldn't even let their negotiators talk. (3) That Leavitt making remarks (such as that Smith was stupid and/or ignorant) was why no one liked Leavitt. (4) On being given permission to speak by the Union, then telling management firmly, over their objection, they were going to listen to Smith, and, in thereafter orderly pressing with Attorney Smith at management's table that the (line) men are worth more money as seen from a comparison with the proposed rate for the warehouse coordinator; and (5) variously, continuing to press the men needed better pay.

If Leavitt viewed such Smith (general) statements on wages as unduly disruptive in difficult negotiations, and thus unproductive interruptions, they are shown herein no less protected. If Smith antagonized Leavitt with Smith's protected statements repeatedly to the effect that the company wage offer was inadequate, Leavitt antagonized Smith in turn with statements that Smith was just blowing off a lot of hot air; and, in asserting that Smith in presentment of his views on wage rates was ignorant and stupid, and/or just speaking out of ignorance.

In regard to the first verbal confrontation, if Smith had antagonized Leavitt by bringing up, and then pressing with Attorney Smith, Smith's view of the inadequacies and deficiencies in Employer's wage proposal, and, the employees' need for more money or better pay to live decently, Leavitt had provocatively earlier interrupted that protected Smith wage discourse with Attorney Smith by telling Smith, why don't you shut up, I'm tired of hearing you; and, by (again) telling Smith he was speaking out of stupidity. If Smith had then further antagonized Leavitt by comparing Leavitt's (perceived) personal economic status with that of a unit employee, with erroneous allusion to Leavitt's ownership of beach property, etc., and, unwarrantedly (without proof), while simultaneously (at least inferably) accusing Leavitt of some impropriety, by additionally saying to Leavitt that something is wrong or crooked here, Smith did so only after Leavitt had just previously angered Smith by again telling Smith publicly in negotiations that Smith was speaking out of stupidity. If Smith then acted physically towards Leavitt in the sense of pulling a table back and advancing a half step on Leavitt, Smith did so only after Leavitt had risen telling Smith (at least) to shut up, and had (as I have found) clearly engaged in as physical noncontact provocative conduct, in sticking a finger in Smith's face and not removing it when Smith requested it, as well as advancing on Smith in turn when in response Smith moved the table.

If Smith told Leavitt that Leavitt was not as tough as Leavitt thought he was, Leavitt had not only not removed his finger from Smith's face when and as requested, but Leavitt had only then the more provocatively stated interimly, I'll stick my finger in anybody's face I want. If Leavitt has as-

serted with some foundation that Smith had disrupted the meeting with an accusation of corruption, Leavitt had even more frequently insulted Smith that day; and, Leavitt was at the time visibly (at least) as angered in discourse as Smith.

Even from Leavitt's vantage point, this was at best (as found) a heated verbal confrontation in which both had willingly participated. There is simply no one-sided, unprovoked Smith provocation evidenced in this first verbal confrontation. Rather, I have found that both had progressively insulted each other, and both are shown as physically at fault. If the unwanted normality of negotiations occasionally producing heated, even excessive remarks is to be set aside, and initiating blame is to be made paramount consideration, and must be placed here, then it clearly falls to Leavitt first so, as he interrupted the Smith-Attorney Smith discourse, rudely and with insult. But one thing is even more basically apparent to me, both were *at least* equally at fault.

Moreover, I readily find Leavitt (at least) shared fault in the later physical altercation. Whatever may have been Leavitt's initial nonmotivation in renewing a confrontation with Smith, it became in effect unquestionably otherwise by his actions when Leavitt walked up hurriedly and directly in front of Smith, and then, if not following actual butting of chests (at least) while then in very close proximity to Smith provocatively demanded (and repeated) Smith get out (or move out) of his way. On clear weight of the more credible evidence, I have relatedly found that Smith (as repeatedly) told Leavitt to go around Smith; and, Smith did not on either of two occasions, provocatively invite Leavitt to go over Smith. I have found Leavitt's speaking to Smith in that proximity and manner was only likely to renew their prior confrontation.

The clear weight of the more mutually consistent and credible evidence is also that Leavitt initiated the physical contact in attempting to pass Smith. I find that in doing so, Leavitt more moved directly forward with his chest to engage Smith and turn Smith physically counterclockwise, intending to thus pass by Smith's left side. Leavitt's contrary assertion of reaching over with his left hand to remove a blocking chair, stepping to the side, and then being *rammed* by Smith, is simply not well supported, certainly not by convincing corroborative evidence; and I do not credit it. While I do have reservation there was as much room as some of General Counsel's witnesses recall, I have no doubt who was the aggressor in making the physical contact.

In that regard, with all the relevant facts now considered, I have no reservation Leavitt's approach to passage that day was not blocked. In that regard, even were I to accept Employer urging of an allowance of 2 feet for Ford's chair (and Bullard) and a dimension of the room at 23-1/2 feet, that would mean there was still some 5 feet in which Smith stood, fully supportive of witnesses accounts there was room for Leavitt passage. In short, I am convinced Leavitt had more opted for initiating physical chest contact to get by Smith, in which any other more reasonable request of Smith, or enlistment of help of others to avoid need for physical contact, unfortunately played no part in Leavitt's judgmental processes that day.

Moreover I am convinced that it was that untoward physical chest effort of Leavitt that caused Leavitt to drop the notebook under his arm, which in turn produced Leavitt's drop of his notebook and (I find) Leavitt's improvident shove

of Smith to the side in annoyance at doing so, and preparatory to intended notebook retrieval. With Smith sent off balance and grabbing understandably at Leavitt in correcting for imbalance, the fray was then on.

Leavitt's assertion that he and Smith later separated by 6 to 7 feet, and that a discourse between them had ensued about the part each played in negotiations, and that one and other should grow up, which then caused Smith to reinstitute a fray a second time, in the face all the more mutually consistent and contrary evidence of the General Counsel's witnesses that there was but one continuous physical encounter, as well as with fair import of the view of the weaknesses evidenced in Respondent's witnesses in support of contrary contention, renders the assertion of Leavitt in that respect, simply unconvincing; and, I do not credit it.

Moreover, the very time passage of the described elements of this physical encounter support that finding. Thus, the timing of the continuous movement of Hatcher around the union table over to the fray ending in the corner, which Hatcher movement had started with the observed and credited initial Leavitt shove of Smith, encompassed the protagonists rotating movements to the other side of the room; the turning of each against the wall; Coleman posturing and effort to separate the two by grabbing Smith's arm from behind; Attorney Smith's unsuccessful similar effort at separating Smith from Leavitt that was then rebuked by Smith, and ceased by Attorney Smith; that was immediately followed by Attorney Smith's urging to Hatcher to separate them; and by Hatcher's immediate arrival and his prompt separation of them. When all these happenings are considered in summary, there was no time for a separation and break-off of the fray, that was to be followed by a further discourse between Smith and Leavitt, and then followed by a Smith renewed fray. To the contrary I find the event most probably had occurred just as Smith with very substantial and consistent corroboration has recounted it, as one fray, not two.

In regard to the alleged Leavitt punch of Smith, Ford had corroborated Smith that Leavitt punched Smith in Smith's lower rib cage on the occasion of Coleman grabbing Smith from behind and causing one of Smith's hands to come off Leavitt. Only then the more remarkably is the fact that Coleman's testimony is so notably silent in support of Leavitt denial of Leavitt punching Smith, where Ford coming around Coleman and Smith, had witnessed it. In contrast, Smith went to the hospital on that account; and, on that very same day he timely caused an assault warrant to be served on Leavitt.

In that regard, I have earlier considered and rejected the Employer's posthearing submission of an entered not guilty verdict, principally because of likely criminal burden of proof confusions, but also for other reasons earlier stated. However, in as much as I need not rest the resolution of the instant allegation on the further grounds of a Leavitt assault of Smith, where it is here clear and found that Leavitt initiated the physical contact with Smith; and, it also determined that Smith did not renew a fray, I accordingly do not reach the assault and battery issue here.

The claim of Smith is otherwise far more supported on this record as a whole than is Leavitt's denial; and, a consideration of the State Benefit Appeals decision, even if Smith were present, would not mandate a contrary conclusion than

that formed on the weight of the credited evidence marshalled herein.

Finally, on the general issue of Leavitt's fault, I would have been far more impressed with the General Counsel's offer of evidence of a purported timely Respondent admission on Leavitt's fault in this fray as attributed by Bullard and Ford to Attorney Smith, had it been made part of General Counsel's case-in-chief, rather than relegated to rebuttal evidentiary status; and, especially where, as here, it alone is deemed necessary to be specially and specifically denied in rebuttal by Attorney Smith, with testimonial offer of what on its face appears reasonable offer of other account. However, again, since I need not rely on that evidence, and as its resolution would not affect my other findings herein, I do not resolve that conflict as well.

An employer reliance on Smith's belief at one time that his developed difficulties relate to an FBI investigation, is not persuasive. Even if Smith didn't just grasp on that at time of discharge (as appears more likely to me), but honestly then held such views, such does not substantially detract let alone offset the fully supported findings made herein that have established the discrimination charged. To extent the Employer would seek to buttress Smith as the aggressor that day by urged reliance on certain asserted prior conduct with another admittedly no less aggressive nonunion employee at lunch time in some prior meeting, the evidence offered on such is both left too questionable and uncorroborated, and the related arguments are unconvincing.

Moreover even were I to find that on such occasion, Smith had told that employee that when the contract was signed they were going to start getting rid of management, and that employees would be leaving with them, such was readily to be evaluated by the employee as not reasonably within Smith's or the Union's power; and the employee as quickly did so in stating he would take his chances. As for an asserted physical threat being then made that if the employee did not stop harassing Smith's (pronoun employee) brothers that Smith was personally going to come down to that employee's area and take care of the situation himself, which the employee asserted he took as a verbal threat, the problem is convincing evidence thereof was not presented. This is only the more so shown to be so where the employee acknowledges *inter alia*, Smith told the employee he was being represented by the Union despite his strong nonunion preference, and the employee acknowledges he was invited to a picnic to learn more about the Union, but declines because of asserted (but only self-perceived and otherwise unsupported) dangers on the road to the picnic (and elsewhere). Though I do not agree with General Counsel's contention such a statement if credibly supported was too ambiguous, I find on the evidence submitted before me, the assertion is not shown to be sufficiently creditworthy.

There remains only to consider the circumstance it was Batten who made the decision to discharge Smith, on an accepted report of Leavitt, with purported confirmation of attending counsel, who did not testify thereon. First, it is fairly apparent that Batten conducted an investigation that was not only one sided in that no inquiry was made of Smith, the union representatives, or other employee witnesses (composing union negotiating team, or observers) present, but notably did not even include timely inquiry of all the available man-

agement witnesses before Batten had decided to and took the action to discharge Smith.

Batten's own account of Leavitt's report to him, even setting aside any consideration of the Employer's vacillating explanation for the nonproduction of notes of Leavitt's report, shows Batten was without knowledge of the extent and subject ramifications of Smith's protected conduct in the negotiations of May 9, even in the face and imposition of Employer's one-spokesman rule. Not only was some of the report, if accurate as to what was reported by Leavitt, now determined erroneous, but inquiry was not made by Batten whether reported Smith outbursts were actually on protected subjects, and protected, as I have found they were here. Indeed, I have found Batten didn't even know, and thus could not have fairly evaluated the effect of the circumstances that Union had not agreed to Employer's one-spokesman rule on Smith's protected conduct.

At best Batten has otherwise advanced four reasons for concluding Smith was the aggressor. The three initially advanced were: Smith had come over to Leavitt in front of their table; Smith had blocked the exit going out; Smith had grabbed the collar of Leavitt. The fourth added, that Smith had pulled the table out.

As found above, and considered in the light of the circumstances in which they individually arose, first, Smith was lawfully over at management's table presenting the employees' view of the Company's wage proposal, when Leavitt had heatedly interrupted Smith, causing Smith to then back over to continue heated discussion with Leavitt. But Smith was certainly no more responsible for that heated discussion with Leavitt, than Leavitt was. Secondly, it is simply not established that Smith blocked Leavitt's exit. Rather, not only is Leavitt's account of his reaching over for a chair and being rammed by Smith itself discredited warrantably on the evidence, but clear weight of evidence is that Leavitt had actually initiated the physical contact and the fray. Thirdly, whatever grabbing by Smith of Leavitt's tie, lapel, or collar that immediately followed by Smith was in nature a preservative and defensive act.

Of the four advanced reasons for Batten's conclusion Smith was aggressor, only the pulling of the table back is substantiated, but that act notably ended in no physical encounter, and it itself followed provocative Leavitt physical act and statement about Leavitt putting a finger in Smith's face that Batten on hearing inquiry proved too oversensitive, then responding with reason, and one more closer to the mark, this was policy.

Yet, in final analysis, what in the end on that very same point proves insurmountable for the Employer's contention to prevail that Smith was lawfully fired in accordance with existing company policy prohibiting assault of a supervisor, and that its disciplinary action in discharge of Smith did not violate Section 8(a)(3), is, Batten's implementation of that policy clearly has treated Smith disparately for his part in a physical fray initiated by a supervisor, and Smith treated that way because of Smith's prominent union activity in these first time negotiations.

What in the end would seem (at least) as not really arguable on the above facts is Leavitt was as much responsible and a participant in the unfortunate incident of May 9, as was Smith. Yet Smith alone was fired and Leavitt not, with distinction being simply made on the basis because Leavitt

was appointed as Employer's representative in the negotiations, period. And, thus without any apparent consideration that the same corporate policy by its terms had as clearly extended to protect employee Smith against assault of others employed, including by a supervisor.

In my view, the Company's selective implementation of its policy in the circumstances of this case, cannot withstand the policy of the Act against the Employer's discrimination against Smith as prior known leading union advocate, and now known leading employee representative and firm advocate in negotiations for increased wages for employees, cf., *Troxel Co.*, 305 NLRB 536 (1991); and on balancing extremities of provocation, see *Brunswick Food & Drug*, 284 NLRB 663, 664 (1987).

Accordingly I conclude and find, for all the above reasons, that by BEMC's discharge of George Douglas Smith on May 10, 1990, the Respondent Employer has engaged in conduct in violation of Section 8(a)(3) and (1).

This is not to indicate that either I, or the Board, would sanction or condone an employee's physical assault of a supervisor. It is to say that on the particular facts as in detail have been found above, a nondisparate and nondiscriminatory defense of such has not been adequately proven in the defense offered, cf., *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

#### CONCLUSIONS OF LAW

1. Brunswick Electric Membership Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union #495, International Brotherhood of Electrical Workers, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By Foreman John Reno Coleman's statements made on June 26, 1989, that effectively threatened employee George Douglas Smith with unspecified reprisals for engaging in union activity, the Respondent Employer has thereby violated Section 8(a)(1) of the Act.

4. By orally maintaining in material times a rule or practice that has discriminatorily prohibited only talk about the Union, and that was unconnected in origin to maintenance of production and discipline, the Respondent Employer has thereby violated Section 8(a)(1) of the Act.

5. By Construction Supervisor Monte Herring's statement made to an employee during the employee's evaluation conducted on July 6, 1989, that Employer was aware of the union activities and aware of the employee's union activities in particular, in circumstances where the employee had not been theretofore openly in favor of the Union, and by Supervisor Erwin Etheridge's silence thereon, the Respondent Employer has thereby created the impression of surveillance of its employees' union activities, and thereby violated Section 8(a)(1) of the Act.

6. By the July 11, 1989 letter of Executive Vice President and General Manager David J. Batten that urged employees to report not just union threats, but subjectively perceived union pressures, and, because the request therein to report "Union pressures" was so broad as to reasonably tend to restrain an employee proponent of the Union from lawfully attempting to persuade another employee through fear the employee union proponent's conduct would be reported to man-

agement, the Respondent Employer has thereby engaged in conduct in violation of Section 8(a)(1) of the Act.

7. By Line Foreman Bobby Johnson's reading of an instruction to his employees in the first and second week of September 1989, on how to stop employee union "harassment," namely, to tell them to leave you alone and that you will let them know if you have any questions or need any information, and, if that doesn't stop it to report it to their supervisor, Respondent Employer has unlawfully encouraged its employees to identify other employees who supported the Union in violation of Section 8(a)(1) of the Act.

8. By the conduct of Whiteville District Manager Ronald Hayes on February 15 and 21, 1990, in interrogating an employee about the union activities, sympathies, and interests of that employee and other employees, Respondent Employer has thereby violated Section 8(a)(1) of the Act.

9. By Heavy Equipment Line Foreman Floyd Cartrette's statements to employee George Douglas Smith on February 28, 1990, that since Smith and the Union have been here, Smith hadn't done nothing but cause trouble; and, if Smith or anybody else thought they could do better, you should quit and find you another job; and, that Smith and the Union were trying to take over the Company, but that was not going to happen, and they were not going to get anything, Respondent Employer has thereby coerced and harassed Smith in regard to his union activities, and has told its employees that continued collective bargaining on the subject of wages was futile, all in violation of Section 8(a)(1) of the Act.

10. By the Company's award of a discriminatorily tainted suspension of George Douglas Smith on March 5, 1990, for 4 days, the Respondent Employer has violated Section 8(a)(3) and (1) of the Act.

11. The following unit is an appropriate unit for collective-bargaining purposes, namely:

All trade and craft employees including Right of Way Operators, Groundmen, Apprentice Linemen, first-class linemen, second-class linemen, Heavy Equipment Operator, Electronic Technicians, Warehousemen, Assistant Warehousemen, Servicemen, Lighting Technicians, Building and Ground Technicians, Load Management Coordinator, Coordinator of Services, Drafting and Mapping Coordinator, Staking Engineer, Junior Staking Engineers/Service Representatives, and Dispatcher at the Respondent's Shallotte, Whiteville, Bolivia and Oak Island, North Carolina facilities and the Whiteville Warehouse Coordinator; excluding Meter Readers, office clerical employees, guards and supervisors as defined in the Act.

12. At all times since September 19, 1989, and continuing to date, the above-named Union has been the collective-bargaining representative of the employees in the above-described unit appropriate for bargaining, and, since September 27, 1989, certified as exclusive collective-bargaining representative for employees in the above unit; and, by virtue of Section 9(a) of the Act, has been, and is now, exclusive representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of the above unit employees.

13. By the Company's unilateral conduct on March 15, 1990, in designating the two unit employees formerly occupying the unit positions of drafting and mapping coordinator and load management coordinator to the two newly created supervisory (and/or managerial) nonunit positions of engineering assistant supervisor and load management coordinator supervisor, with improper continued assignment of unit work to be performed by them, without notice and bargaining with the Union thereon, the Respondent Employer has violated Section 8(a)(5) and (1) of the Act.

14. By BEMC's discharge of George Douglas Smith on May 10, 1990, the Respondent Employer has engaged in conduct in violation of Section 8(a)(3) and (1) of the Act.

15. By all the above conduct, the Employer has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

16. The Employer has not engaged in any other unfair labor practices that are alleged in the complaint.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended its employee George Douglas Smith for 4 days, and subsequently discriminatorily discharged him on May 10, 1990, it must offer him reinstatement and make him whole for the 4-day suspension, and for any loss of earnings and other benefits, computed on a quarterly basis from date of his discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As it appears from an all party posthearing telephone conference call that Smith has served in Dessert Storm, the Employer will be required to notify Smith, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces. As Employer has effectively assigned unit work to individuals occupying positions not in the bargaining unit, in agreement with request of General Counsel, I shall recommend that Employer be ordered to rescind any assignment of unit work to nonunit positions, whether supervisory and/or managerial, or otherwise; and cease and desist therefrom without first lawfully bargaining with the Union about it.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Brunswick Electric Membership Corporation, Shallote and Whiteville, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals for engaging in union activity.

(b) Orally maintaining a rule or practice that discriminatorily prohibits only talk about the Union.

(c) Coercively interrogating any employee about their union activities, interests or sympathies, or those of their fellow employees.

(d) Creating the impression of surveillance of its employees' union activities.

(e) Urging employees to report overly broad, subjectively perceived "Union pressures" not involving union threats.

(f) Unlawfully encouraging its employees to identify other employees who support the Union.

(g) Coercing and harassing any employee, by telling the employee since the employee and Union have been here, the employee hasn't done anything but cause trouble; and, if the employee or anybody else thought they could do better, they should quit and find another job; and, by telling its employees continued collective bargaining on the subject of wages is futile.

(h) Engaging in unlawful unilateral conduct in designating unit employees formerly occupying the unit positions to newly created supervisory (and/or managerial) nonunit positions with improper continued assignment of unit work to be performed by them, without notice and bargaining with the Union thereon.

(i) Discriminatorily suspending, discharging or in other manner discriminating against George D. Smith, or any employee for supporting Local Union #495, International Brotherhood of Electrical Workers, AFL-CIO, CLC, or any other union.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind any assignment of unit work to nonunit positions; and, on request, bargain with the Union as exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All trade and craft employees including Right of Way Operators, Groundmen, Apprentice Linemen, first-class linemen, second-class linemen, Heavy Equipment Operator, Electronic Technicians, Warehousemen, Assistant Warehousemen, Servicemen, Lighting Technicians, Building and Ground Technicians, Load Management Coordinator, Coordinator of Services, Drafting and Mapping Coordinator, Staking Engineer, Junior Staking Engineers/Service Representatives, and Dispatcher at the Respondent's Shallote, Whiteville, Bolivia and Oak Island, North Carolina facilities and the Whiteville Warehouse Coordinator; excluding Meter Readers, office clerical employees, guards and supervisors as defined in the Act.

(b) Offer George Douglas Smith immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed; or, if he is presently serving in the Armed Forces of the

<sup>2</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

United States, notify him of his right to full reinstatement upon application in accordance with the Selective Service Act and Universal Military Training and Service Act, as amended, after discharge from the Armed Forces; and, make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Remove from the files of George D. Smith, any reference to his unlawful suspension and discharge and notify him in writing that it has done so and that it will not use the suspension or discharge against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in Shallotte and Whiteville, North Carolina, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully maintain a rule or practice that discriminatorily prohibits talk about the Union.

WE WILL NOT create the impression of surveillance by unlawfully telling our employees we are aware of their union activities.

WE WILL NOT unlawfully restrain our employees in the exercise of their above Section 7 rights by urging our employees to report union pressures, other than threats.

WE WILL NOT unlawfully encourage employees to identify other employees who support the Union.

WE WILL NOT unlawfully interrogate our employees about their union activities, sympathies, or interests, or that of other employees.

WE WILL NOT harass and coerce any of our employees by telling them that since the Union has been here, they haven't done anything but cause trouble; or, that if any employee thinks that they could do better, they should quit and find another job; or, tell our employees that the Union's continued bargaining with the Company on wages will be futile.

WE WILL NOT discriminatorily suspend or discharge George "Doug" Smith, or any other employee because of their activities in support of Local Union #495, International Brotherhood of Electrical Workers, AFL-CIO, CLC, or any other union.

WE WILL NOT unilaterally assign unit work to any individuals outside the unit, without notice to and first bargaining with the Union about it.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer George Douglas Smith immediate and full reinstatement to former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed; or, if he is presently serving in the Armed Forces of the United States, notify him of his right to full reinstatement upon application in accordance with the Selective Service Act and Universal Military Training and Service Act, as amended, after discharge from the Armed Forces and, make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL remove from the files of George Douglas Smith, any reference to his unlawful suspension and discharge and notify him in writing that we have done so and that we will not use the suspension or discharge against him in any way.

WE WILL rescind any unilateral action of ours in assigning unit work to the new supervisory and/or managerial positions of engineering assistant supervisor and load management supervisor.

WE WILL, on request, bargain with the Union as exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All trade and craft employees including Right of Way Operators, Groundmen, Apprentice Linemen, first-class linemen, second-class linemen, Heavy Equipment Operator, Electronic Technicians, Warehousemen, Assistant Warehousemen, Servicemen, Lighting Technicians, Building and Ground Technicians, Load Management Coordinator, Coordinator of Services, Drafting and Mapping Coordinator, Staking Engineer, Junior Staking Engineers/Service Representatives, and Dispatcher at

the Respondent's Shallotte, Whiteville, Bolivia and Oak Island, North Carolina facilities and the Whiteville Warehouse Coordinator; excluding Meter Readers, of-

fice clerical employees, guards and supervisors as defined in the Act.

BRUNSWICK ELECTRIC MEMBERSHIP CORPORATION